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To demonstrate that substantial protection has been given to published material dealing with sex, an analysis of the constitutional criteria governing recent Supreme Court decisions in the area of obscenity censorship is presented. It is found that the Supreme Court uses "hard core pornography" as the foundation of a "constant" concept of obscenity. A "variable" concept making the validity of censorship dependent upon the particular material's primary audience and the nature of its appeal to that audience is endoreed and explained. Also discussed are (1) the requirement that material be judged as a whole on the basis of its dominant theme, (2) the weight to be given "redeeming social importance," (3) the protection of "immoral" ideas, (4) the requirement of "scienter," (5) the meaning and application of "contemporary community standards," and (6) the need for independent judicial review of obscenity findings. (Author/DL)

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ARTICLES

Censorship of Obscenity: The Developing Constitutional Standards

William B. Lockhart
Robert C. McClure

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Censorship of Obscenity: The Developing Constitutional Standards

The authors discuss the constitutional criteria controlling recent decisions of the United States Supreme Court in the area of obscenity censorship and demonstrate that substantial protection has been given to published material dealing with sex. In considering the development of a test to identify "censorable obscenity," they examine the nature of pornography and conclude that it provides a useful guide. They find that "hard-core pornography" is the foundation for the "constant" concept of obscenity currently applied by the Court; and they advocate a "variable" concept which would make the validity of censorship depend upon the particular material's primary audience and upon the nature of the appeal to that audience. The authors also discuss: (1) the requirement that material be judged as a whole on the basis of its dominant theme, (2) the weight to be given "redeeming social importance," (3) the protection of "immoral" ideas and the "end of ideological obscenity," (4) the requirement of scienter, (5) the meaning and application of "contemporary community standards," and (6) the need for independent judicial review of obscenity findings.

William B. Lockhart* and
Robert C. McClure**

In 1957, for the first time in its history, the United States Supreme Court squarely faced the then unresolved problem[1] of the constitutionality of official censorship of obscenity. It had been presented the problem once before—almost ten years earlier—but on that occasion aborted the case: in *Doubleday & Co. v. New York*[2] an equally divided Court affirmed without opinion Dou-

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[1] See Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution,* 38 Minn. L. Rev. 295, 352–58 (1954).

[2] 335 U.S. 848 (1948).

bleday's conviction under a New York obscenity statute for publishing Edmund Wilson's *Memoirs of Hecate County.*[3] But by 1957 the deadlock in the Court had been broken,[4] and in that year the Court began firmly, though not always unanimously, to mark out constitutional standards governing the censorship of obscenity. The process is not yet complete—perhaps it never will be fully completed—but substantial progress has already been made in setting up important safeguards to protect works of aesthetic or other social value.[5] The extent of the progress may be measured by the fact that an important publisher, justifiably confident of the new constitutional protection, is undertaking the republication of *Memoirs of Hecate County* and doing it, of all places, in Boston, Massachusetts.[6]

I. THE SETTING

The setting in which these developments took place changed markedly between 1957 and 1960. Both the methods and the targets of the proponents of censorship shifted substantially.

In early 1957 the National Office for Decent Literature—popularly known as the NODL—was still an effective force in the suppression of magazines and paper-bound books it believed to be objectionable.[7] In response to earlier criticism of some of its practices[8] the NODL had already changed its name from the "National *Organization* for Decent Literature" to the "National *Office* for Decent Literature" in an effort to disassociate itself from the actions of local NODL extremists.[9] But it was not until May, 1957, when the American Civil Liberties Union, in a statement signed by 150 persons prominent in literature and the arts, blasted the NODL's methods of operation that the NODL began to decline as a potent force in the suppression of books and magazines.[10] Since then the NODL has become more the "service organization" its apologists have claimed it is and less the "action group" its critics said it was[11] and as such has removed itself from the center of the controversy over the censorship of literature.[12]

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[3] For an account of the case, see Lockhart & McClure, *supra* note 1, at 295–301.

[4] The deadlock was broken on Feb. 25, 1957, in Butler v. Michigan, 352 U.S. 380 (1957), followed shortly afterwards on June 24, 1957, by Roth v. United States, 354 U.S. 476 (1957), Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), and Adams Newark Theater Co. v. City of Newark, 354 U.S. 931 (1957). For analyses of these and subsequent cases, see pp. 13–47 *infra.*

[5] See DOUGLAS, THE RIGHT OF THE PEOPLE 66 (1958). The new safeguards are discussed at pp. 47–120 *infra.* For an excellent analysis of the Supreme Court cases from 1957–1960 see Kalven, *The Metaphysics of the Law of Obscenity,* THE SUPREME COURT REVIEW 1 (1960).

[6] Censorship Scoreboard, Jan. 1960, p. 8.

[7] For a description of the NODL and its operations, see Lockhart & McClure, *supra* note 1, at 304–05, 309–11, and 317–18. See also Rorty, *Harassed Pocket-Book Publishers,* 15 ANTIOCH REV. 411 (1956).

[8] The practices particularly criticized were its use of general boycotts against retail dealers who refused to withdraw from sale the books and magazines listed as objectionable by the NODL, and its tacit consent to the use of its lists by policemen and prosecutors who threatened dealers with criminal prosecution if they failed to withdraw the proscribed items from sale. 10 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 143 (1955); Bourke, *Moral Problems Related to Censoring the Media of Mass Communications,* 40 MARQ. L. REV. 57 (1956); Murray, *Literature and Censorship,* 14 BOOKS ON TRIAL 393 (1956); Fischer, *The Harm Good People Do,* Harpers, Oct. 1956, vol. 213, p. 14; Murray, *The Bad Arguments Intelligent Men Make,* America, Nov. 3, 1956, vol. 96, p. 120.

The systematic use of lists by policemen and prosecutors threatening dealers with criminal prosecution if they continued to sell the listed publications[13] also declined during this period. Detroit's notorious censorship system,[14] in full operation at the beginning of 1957, ended before the year was out when the publishers of the hard-cover and paper-bound editions of John O'Hara's *Ten North Frederick,* one of the many books on the Detroit lists, secured injunctions restraining the City of Detroit and two of its police officials from making any threat of prosecution to any person selling the book.[15] The prosecuting attorney of St. Clair County, Michigan, who had been using the NODL lists, received the same treatment[16]—as did the prosecuting attorney of Lake County, Indiana.[17] The New York City commissioner of licenses, who had written letters to news dealers threatening them with revocation of their licenses if they continued to sell designated publications, was ordered to withdraw the letters and to instruct the news dealers to disregard them.[18]

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[9] Murray, *The Bad Arguments Intelligent Men Make, supra* note 8. The change of name came as early as 1955. Fitzgerald, *NODL States Its Case,* America, June 1, 1957, vol. 97, pp. 280 & 281.

[10] American Civil Liberties Union [ACLU] Statement on Censorship Activity by Private Organizations and the National Organization for Decent Literature (n.d.); ACLU, Civil Liberties, May 1957, p. 1. For the NODL's reply to the ACLU statement, see Fitzgerald, *NODL States Its Case, supra* note 9. And for the ACLU's rejoinder, see ACLU, Civil Liberties, Sept. 1957, p. 2.

[11] Murray, *The Bad Arguments Intelligent Men Make, supra* note 8. Despite the changes in the NODL's operations, the ACLU in its 1957 statement failed to recognize that these changes had already taken place; and the NODL, in response, ignored the fact that it had earlier encouraged the activities criticized by the ACLU. See authorities cited note 10 *supra.*

[12] By mid-1958, the ACLU reported: "Possibly as a result of considerable criticism of the NODL, many local communities engaged in a literary 'clean-up' campaign are now compiling their own lists of offending publications and relying less on the monthly NODL compilation." 38th ACLU ANN. REP. 15 (1958).

[13] For a discussion of this method of censorship and its legality, see 22 U. CHI. L. REV. 216 (1954).

[14] The Detroit operation is described in Lockhart & McClure, *supra* note 1, at 314–16. See also Lardner, *Let 'em Eat Newspapers,* Newsweek, Mar. 14, 1955, vol. 45, p. 92; *The Smut Detective,* Newsweek, Mar. 21, 1955, vol. 45, p. 95.

[15] American Book Publishers Council [APBC] Censorship Bull., July 1957, p. 3; ABPC, Censorship Bull., Aug. 1958, p. 4.

[16] ABPC, Censorship Bull., July 1957, p. 3.

The injunctions against combining disapproved lists with threats of prosecution[19] have not altogether stopped the practice; some officials still continue to issue orders or "requests" to dealers with thinly veiled threats of prosecution. But these instances seem to occur sporadically and are often limited to a particular book or to a single issue of a magazine.[20] In only Rhode Island[21] and King

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[17] H M H Publishing Co. v. Garrett, 151 F. Supp. 903 (N.D. Ind. 1957).

[18] Sunshine Book Co. v. McCaffrey, 4 App. Div. 2d 643, 168 N.Y.S.2d 268 (1957). The Philadelphia district attorney received similar treatment after threatening motion picture exhibitors with prosecution if they exhibited "And God Created Woman." Kingsley Int'l Pictures Corp. v. Blanc, 396 Pa. 448, 153 A.2d 243 (1959). Another suit is pending in Jacksonville, Florida, where publishers have sued the Duval County solicitor and sheriff. Censorship Scoreboard, Mar. 1960, p. 1.

[19] See note 13 *supra.*

[20] In Menlo Park, Palo Alto, San Mateo, and Mountain View, California, the police "requested" dealers to withdraw from sale the November, 1959, issue of *Playboy* magazine because it contained photographs from the European version of the movie "Cry Tough." Palo Alto Times, Nov. 6, 1959, p. 1, col. 4. In Evansville, Indiana, the county prosecutor pressured the local wholesale distributor to drop 40 magazines. 38th ACLU ANN. REP. 12 (1958). And in Andersen, Indiana, law enforcement authorities served notice that any dealer or distributor of 108 "obscene" publications faced arrest. *Hearings on Control of Obscene Material Before Subcommittee on Constitutional Amendments and Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary,* 86th Cong., 1st & 2nd Sess. 18 (1960). The police chief of Rockport, Massachusetts, ordered Maxine Davis' *The Sexual Responsibility of Woman* removed from newsstands and store shelves. His action produced a sell-out of the book in nearby Gloucester. N.Y. Times, July 25, 1959, p. 4, col. 8.

In Camden, New Jersey, the public safety director issued a list of 71 "lewd" publications, warning dealers that anyone who sold any of the publications would be prosecuted. ABPC, Censorship Bull., Nov. 1959, p. 5. But in nearby Trenton, New Jersey, when police visited dealers telling them that Grace Metalious' *Peyton Place* was banned, the city counsel ruled them out of order and the public safety director then announced that no order banning sale of the book would be issued. ABPC, Censorship Bull., April 1958, p. 8. In Houston, Texas, "the police department was first ordered to remove from the newsstands 'every magazine that shows a bare leg.' However, this was quickly modified by the action of the Harris County News Co. to include only 11 *specific publications* . . . ." *Hearings, supra,* at 18. Similarly, in New Orleans the police department "declared war" on all magazines containing "a picture showing 'bare breasts or bare buttocks.' " *In re* Louisiana News Co., 187 F. Supp. 241, 243, 245 (E.D. La. 1960). The court enjoined police officials from further seizures of or interference with the magazines.

[21] In Rhode Island a state Commission to Encourage Morality in Youth was created April 26, 1956, by a legislative resolution authorizing the commission to "educate the public concerning any book . . . or other thing containing obscene, indecent or impure language, or manifestly tending to

County, Washington,[22] do officials appear to make systematic use of lists of proscribed publications.

With the retreat of the NODL and the decline in the systematic use of lists of proscribed publications came a new type of organization and a sharp increase in the practice of abruptly prosecuting news dealers on criminal charges without forewarning.[23]

The new type of organization began with the formation of Citizens for Decent Literature in Cincinnati, Ohio. Carefully avoiding the much-criticized practices of the NODL, CDL counsels against telling any dealer what not to sell. Instead, CDL limits its operations to stirring up public agitation against magazines thought to be obscene, and to encouraging and assisting law enforcement officials in the prosecution of obscenity cases.[24] Encouraged by a number of successful prosecutions of wholesale and retail news dealers in Cincinnati, interested individuals in other

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the corruption of the youth . . ." and to "investigate and recommend the prosecution of all violations . . . ." R.I. Acts & Resolves, Res. No. 73, at 1102. The commission prepares and circulates to dealers and police throughout the state lists of proscribed books. ABPC, Censorship Bull., Nov. 1957, p. 3; ABPC, Censorship Bull., April 1958, p. 3. At first the lists were considered "orders" to the police, but they are now called "guides for the police." ACLU, Feature Press Serv., Wkly Bull. 1940, Mar. 10, 1958, p. 3. But whether "orders" or "guides," any dealer who refuses to comply faces almost certain criminal prosecution. A Newport wholesaler who refused to withdraw from sale Grace Metalious' *Peyton Place* after it had been blacklisted by the commission was promptly arrested and indicted for violating the obscenity statute. 38th ACLU ANN. REP. 13 (1958); Censorship Scoreboard, Jan. 1960, p. 6. See State v. Settle, 156 A.2d 921 (R.I. 1959). According to the ACLU, the secretary of the commission defends its "circulation of blacklists to book dealers and police by saying that methods used in the courts would only flood dockets and delay justice while more smut was sold and read." 39th ACLU ANN. REP. 16 (1959). See generally, *Report of the New York State Joint Legislative Committee Studying the Publication and Dissemination of Offensive and Obscene Material*, No. 85, pp. 22–23, 157–60 (1958).

[22] In King County, Washington, the prosecuting attorney created a "King County Salacious Literature Committee" with representatives from the bar association, American Legion, P.T.A., church groups and the vice squad of the police department. It meets with a representative of the news wholesalers in the Seattle area, examines magazines to determine whether they are obscene, and requests the wholesaler to withdraw the offending magazines from sale or to limit their sale to a certain percentage of retail outlets away from schools, churches, and playgrounds. After each meeting a letter—written on the prosecuting attorney's official stationery and signed by a deputy—is mailed to the news wholesalers, listing the magazines to be withdrawn from sale or restricted in retail distribution. ACLU, Washington Chapter, Freedom of Speech Committee, Report of Subcommittee on Printed Matter, Dec. 16, 1957.

[23] See, *e.g.*, City of Cincinnati v. King, 168 N.E.2d 633 (Cincinnati Munic. Ct. 1960). Before 1957, criminal prosecutions of reputable news dealers were relatively rare and seldom successful. See Lockhart & McClure, *supra* note 1, at 309.

[24] Sullivan, *Cincinnati v. Pornography*, 23 Catholic Digest, June 1959, p. 12.

Ohio cities formed similar local organizations. In 1958 a statewide organization was formed,[25] and it was not long before similar groups began to spring up in other parts of the country.[26] A national organization was formed in February, 1960.[27] So far, the only serious criticism leveled at the CDL has centered on its organized campaigns to write letters to judges who have obscenity cases pending before them.[28]

Perhaps as a result of the encouragement given to them by CDL groups, law enforcement officials all over the country increasingly resorted to swift police raids, followed by arrest and criminal prosecution for selling obscene publications. For example, last year in Indianapolis, Indiana, city police and sheriff's deputies raided 16 drug stores, a wholesale news dealer's warehouse, a variety store, and a book store, seizing 1,500 copies of more than 70 magazines.[29] The manager of the wholesale news business, the manager of a chain of drug stores, and 19 retailers were arrested and charged with selling such allegedly "obscene" publications as *Playboy, National Enquirer, Police Gazette,* and *Tempo.*[30] After the arrests some of the retailers closed out their magazine departments.[31] As might be expected, the local CDL group supported the raids and arrests.[32]

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[25] ABPC, Censorship Bull., Aug. 1958, p. 6; ACLU, Feature Press Serv., Wkly Bull. 1963, Sept. 22, 1958, p. 1.

[26] The Twin Cities Citizens for Decent Literature was organized in Minneapolis and St. Paul, Minnesota in 1959. Minneapolis Morning Tribune, Sept. 23, 1959, p. 17, col. 6. For news of the organization of local groups in other cities, see Citizens for Decent Literature of Greater Cleveland, Newsnotes (Jan. 1960).

[27] *Hearings on Circulation of Obscene and Pornographic Material Before the House Committee on Post Office and Civil Service,* 86th Cong., 2d Sess. 15 (1960); ABPC, Censorship Bull., June 1960, pp. 2–5.

[28]

> In some obscenity trials there were evidently CDL-organized campaigns of letters addressed to presiding judges and CDL-"packing" of courtroom audiences. This technique drew a judicial rebuke in 1958. "Last April, Municipal Judge Clarence Denning withdrew from an obscene literature case after an organized letter campaign bombarded him . . . Judge Frank M. Gusweiler, who took over the case, vigorously criticized pressure groups for attempting to influence the courts." (*Cincinnati Enquirer,* 11/4/58)
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> In 1960, CDL in Indianapolis received a similar rebuke. Municipal Court Judge Joseph N. Myers had been subject to a similar pressure campaign and announced that such letters are in effect efforts to intimidate or coerce the court, and that their writers could be held in contempt. Lady members of CDL and St. Agnes High School pupils had jammed the courtroom; one CDL member kept an attendance list. (*Indianapolis Star,* 1/5; *Times,* 1/4)

ABPC, Censorship Bull., June 1960, p. 3. See also Catholic Universe Bull., Feb. 5, 1960, p. 10, col. 2.

[29] 39th ACLU ANN. REP. 18 (1959).

[30] *Hearings, supra* note 20, at 16–18.

[31] *Ibid.*

[32] *Ibid.* The support took several forms: stimulation of arrests and

Criminal prosecutions have an enormous impact upon retail and wholesale news dealers—reputable businessmen in their communities. The embarrassment and shame of being charged with the crime of selling obscene literature, added to the trouble and expense of defending against criminal actions, are enough to terrify dealers in any community in which the practice of criminal prosecution without forewarning has been employed. In Cleveland, we are informed, only one rather obscure book dealer has dared to stock the Kronhausens' *Pornography and the Law*, a serious effort to define matter that may constitutionally be censored as obscene.[33] And in Cincinnati the climate is such that the public library director refused to accept a copy of Vladimir Nabokov's *Lolita*, even as a gift to the library.[34] Perhaps the severe impact of criminal prosecution, radiating far beyond the particular books and magazines upon which successful prosecutions have been based,[35] explains in part why law enforcement officials have made relatively little use of the injunctive and book libel proceedings that are available to them in many states.[36]

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prosecutions; assistance in the preparation of evidence; packing courtrooms at the trials; and writing letters to judges before whom cases were pending. 39th ACLU ANN. REP. 18 (1959).

[33] This information was obtained on January 30, 1960, in a conversation at Cleveland between Professor McClure and Mr. Howard B. Klein, President of the City Club of Cleveland, Ohio, and a prominent book dealer in that city.

[34] 39th ACLU ANN. REP. 19–20 (1959).

[35] In December, 1958, after a jury found Joseph L. Marshall, Cincinnati's major news wholesaler, guilty of selling the magazines *For Men Only, Escapade, High Life, Gent, Dude, Bachelor, Glance, Pose, Sir!, Men, Man's Life, Man's Conquest, Real Men*, and *Rugged Men*, Mr. Marshall voluntarily discontinued the distribution of *Nugget, Scamp, Men for Men, Rogue, Stag, Playboy, Ace, Modern Man, Sexology*, and *Sir Annual*. Letter from Charles H. Keating, Jr., Chairman of CDL, to Father Paul Bussard, Publisher of the *Catholic Digest*, Feb. 7, 1959.

[36] See text accompanying notes 587–88 *infra*. So far as we have been able to determine, there have been only four injunctive or book libel proceedings instituted since 1956.

An injunctive proceeding was recently instituted in Ohio against the Mahoning Valley Distributing Agency to enjoin the distribution of 14 magazines and four books, including *Playboy* magazine and D. H. Lawrence's *Lady Chatterley's Lover*. Censorship Scoreboard, Jan. 1960, p. 6.

In Georgia, the State Literature Commission (see Lockhart & McClure, *supra* note 1, at 312–13) obtained an injunction against the sale of the paper-bound novel *Turbulent Daughters*. 38th ACLU ANN. REP. 12 (1958).

In Illinois, the City of Chicago sought an injunction against a news wholesaler to restrain distribution of alleged obscene matter, but the superior court voided the ordinance authorizing the injunction proceedings because it did not require scienter of the distributor. Note, *The Requirement of Scienter in Obscenity Statutes*, 9 DE PAUL L. REV. 250, 253 n. 19 (1960).

And in Kansas City, Missouri, police raided the premises of a news wholesaler and five retailers, seizing 13,000 copies of 280 publications under a statute authorizing the seizure and destruction of obscene matter without criminal prosecution. A circuit judge later found that 95 of the 280

As these developments were taking place, the principal target of censorship changed almost completely. Before 1957, paper-bound books—most of them reprints of books previously published in hard covers—were the object of most concern.[37] But as criminal prosecutions began to replace the use of lists of proscribed publications—and perhaps also as it became increasingly clear that works of any genuine value are entitled to constitutional protection against censorship—the main focus of censorship shifted to girly magazines and erotic photographs.[38] Only a few paper-bound books, such as D. H. Lawrence's *Lady Chatterley's Lover* and Grace Metalious' *Peyton Place*, encountered censorship trouble of any kind.[39] And, as is usual in such cases, the efforts to censor books boomeranged; *Peyton Place* is now the second-best seller in the twentieth century[40] and the Postmaster General's tangle with

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publications were obscene. ABPC, Censorship Bull., Apr. 1958, p. 3. The Missouri Supreme Court affirmed his decision. *In re* Search Warrant of Property at 5 W. 12th St. v. Marcus, 334 S.W.2d 119 (Mo. 1960).

In New York, when officials by-passed the injunctive proceedings available to 'them and instituted criminal proceedings against the Richmond County News Co., the defendant complained bitterly that it could not be prosecuted in the absence of a warning or a notice of injunctive proceedings. But the motion to dismiss the information was overruled almost summarily. People v. Richmond County News, Inc., 8 Misc. 2d 162, 167 N.Y.S. 2d 406 (Ct. Spec. Sess. 1957). And the defendant was subsequently convicted of selling an obscene magazine. People v. Richmond County News, Inc., 13 Misc. 2d 1068, 179 N.Y.S.2d 76 (Ct. Spec. Sess. 1958).

[37] Lockhart & McClure, *supra* note 1, at 302–20.

[38] *E.g., In re* Search Warrant of Property at 5 W. 12th St. v. Marcus 334 S.W.2d 119 (Mo. 1960) (girly magazines); Glanzman v. Christenberry, 175 F. Supp. 485 (S.D.N.Y. 1958) (photographs of nude and semi-nude women); Klaw v. Schaffer, 151 F. Supp. 534 (S.D.N.Y. 1957), *aff'd*, 251 F.2d 615 (2d Cir. 1958) (bondage photographs). See also ABPC, Censorship Bull., June 1960, p. 1.

According to its chairman, the CDL has not taken any direct action against books that have reached the best-seller lists. *Hearings on Mailing of Obscene Matter Before Subcommittee No. 1 of the House Committee on the Judiciary*, 85th Cong., 2d Sess. 75 (1958).

[39] In San Mateo County, California, a local NODL group, calling itself the Citizens Group for Better Reading Material, organized a typical NODL campaign against such books as *Andersonville* and *Peyton Place*. It encountered considerable opposition and the campaign probably didn't last very long. ABPC, Censorship Bull., April 1958, p. 6; ACLU, Feature Press Serv., Wkly Bull. 1961, Sept. 8, 1958, p. 2.

In Omaha, Nebraska, three persons were prosecuted and convicted for selling *Peyton Place*, but their convictions were reversed on appeal when the Nebraska Supreme Court ruled the Omaha ordinance under which they were convicted void for vagueness. ACLU, Feature Press Serv., Wkly Bull. 1940, Mar. 10, 1958, p. 3.

In addition to its trouble with the Postmaster General, see text accompanying notes 492–94 and 634–37 *infra, Lady Chatterly's Lover* encountered difficulty in Providence, Rhode Island, where police requested druggists to remove the unexpurgated version of the novel from sale. 1 Inside ACLU, Oct. 1959, p. 2. See also note 36 *supra*.

[40] ACLU, Feature Press Serv., Wkly Bull. 1940, Mar. 10, 1958 p. 3. Erskine Caldwell's *God's Little Acre* still holds first place. *Ibid.*

Lady Chatterley's Lover sent its sales soaring and set publishers to quarreling over publication rights and authorized versions of the book.[41] The fight, it seems, is no longer so much between the literati and the Philistines[42] as it is between the libertarians and the censorious.[43]

How much the emerging constitutional standards governing the censorship of publications for obscenity contributed to these changes in the pattern of censorship is difficult to determine. The standards thus far established have emerged piecemeal in a series of decisions and opinions of the United States Supreme Court, and it is hard to trace a direct causal relationship between those decisions and opinions and the changes in the censorship pattern. Yet it is equally difficult to avoid drawing the inference that the new constitutional standards must have contributed to the relative freedom from censorship that now exists for both paper-bound and hard-cover books.

II. THE DECISIONS: THEIR CONTEXT AND IMPACT

A. The Butler Case

Butler v. Michigan,[44] decided in February, 1957, was the first case to break the Supreme Court's deadlock over obscenity. The case began in June, 1954, with the prearranged sale of Griffin's *The Devil Rides Outside* by Alfred Butler, Detroit sales manager for the paper-bound edition's publisher, to Inspector Herbert W. Case, then chief of Detroit's police censor bureau.[45] The sale had been carefully staged to test the constitutionality of a Michigan obscenity statute,[46] which prohibited the sale—even to an adult—

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[41] Hamalian, *The Lady Chatterley Spectacle*, 3 Colum. Univ. Forum 8, 13 (Winter 1960); N.Y. Times, Aug. 8, 1959, p. 9, col. 6; N.Y. Times, Aug. 1, 1959, p. 9, col. 3; N.Y. Times, July 30, 1959, p. 20, col. 4; N.Y. Times, July 23, 1959, p. 14, col. 2.

[42] Lockhart & McClure, *supra* note 1, at 343.

[43] When works of literary stature are attacked, the literati rise in arms to protect literature. But when the material under attack is, like girly magazines, lacking in literary value, the literati remain quiescent and only the strong civil libertarians rise in opposition. In an address at an ACLU conference in May, 1960, Dan Lacy, managing director of ABPC, recommended the ACLU should "concern itself with defending only those publications having some slight 'redeeming social importance.' Many delegates disagreed, holding that this would place the burden of proof on the defendant and would narrow rather than broaden freedom of expression." ACLU, Civil Liberties, May 1960, p. 3.

[44] 352 U.S. 380 (1957).

[45] ABPC Bull., Censorship Developments, July 20, 1954, p. 1.

[46] Mich. Stat. Ann. § 28.575 (1938). The statute, stripped of some of its excess verbiage, provided:

> Any person who shall . . . sell . . . any book . . . or other thing . . . *containing* obscene . . . language, or obscene . . . pictures . . . or descriptions, tending to incite *minors* to violent or depraved acts,

of any book containing an obscenity that might tend to incite minors to depraved acts or tend to corrupt their morals.[47] Case promptly arrested Butler[48] and the test was on its way.

And as a test case it was a good one. For, as with all paperbound books then sold in Detroit,[49] the local wholesale news distributor had submitted a copy of the book to the police censor bureau in advance of its distribution to retail outlets. In the bureau, police officers searched the book for objectionable words and passages and then passed the objectionable excerpts on to Inspector Case, who in turn referred them to an assistant county prosecutor for an opinion on whether the book violated the Michigan statute.[50] The assistant prosecutor, as was his custom, applied a

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> manifestly tending to the corruption of the morals of youth . . . shall be guilty of a misdemeanor.

(Emphasis added.) The statute, patterned after a similar Massachusetts statute, is typical of those in force in a number of states. See Lockhart & McClure, *supra* note 1, at 339 nn.303 & 305, and at 343–44 n.321.

[47]

> A book had been picked as a test for which a finding of obscenity was probable if one followed the letter of the Michigan statute—which, as you know, condemns works "containing" objectionable material—ignoring the content and the purpose of the work as a whole. The principal purpose of the case was to provide an opportunity to test the constitutionality of the statute.

Letter From Dan Lacy, Managing Director of ABPC, to Robert C. McClure, July 30, 1954.

[48] Record, pp. 19–20, Butler v. Michigan, 352 U.S. 380 (1957).

[49] The Detroit censorship operation is described in Lockhart & McClure, *supra* note 1, at 314–16.

[50] At the trial, the prosecution submitted an exhibit of 101 excerpts from John H. Griffin's, *The Devil Rides Outside* upon which Inspector Case based his request for a warrant. Record, pp. 21, 252–94. Typical of the excerpts were the following:

> (Excerpt 6 from Page 31)
> "These bastards! These ignorant bastards!"

Appellee's Motion to Dismiss Appeal, Appendix "A," Copy of People's Exhibit 2, filed with Defendant's Application for Leave to Appeal to Michigan Supreme Court, p. 2a.

> (Excerpt 10 from Page 78)
> "I think of sleeping warm sleep, with an arm thrown across the soft belly of my Lucette."

Id. at 3a.

> (Excerpt 31 from Page 166)
> "I can't make you out, Doctor. One moment you're a mystic, in love with something intangible to the point of being poetic, and the next moment you want to get me the worst old whore in the Valley."

Id. at 17a–18a.

> (Excerpt 76 from Page 442)
> "And tell me, do you think maybe I should try to keep her satisfied in the meantime? I've never had any sexual experience, I'm just asking you."

Id. at 37a.

> (Excerpt 81 from Pages 480 and 482)
> "She's a fine woman, you know. I hope the bitches will leave her in peace this time."

Id. at 39a.

simple test in arriving at his official opinion: if he didn't want his young daughter to read the book, he decided it was illegal.[51] Applying this test to *The Devil Rides Outside*, he found it illegal and prepared an opinion to that effect. The opinion was then transmitted to the distributor, who withheld the book from distribution to retail outlets.[52] And so *The Devil Rides Outside* joined the company of the numerous novels that appeared on the Detroit lists of proscribed books, many of which were the distinguished works of renowned authors.[53]

But good as the test case was, it did not make much of an impression upon the judge of the Detroit recorder's court who tried it. After a trial of several days, he lightly dismissed the constitutional arguments that had been advanced,[54] ruled that sale of the book violated the Michigan statute,[55] found Butler guilty and fined him $100.[56] In the United States Supreme Court, however, the constitutional arguments carried greater weight.[57]

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[51]

> "We're policemen, not censors," Case said . . . . "There's a law on the books that makes it a misdemeanor to distribute any book that might tend to corrupt the morals of the young. If we think a book fits that description, we go into action."
>
> Going into action means that the censor bureau submits the book to John J. Rusinack, assistant prosecutor, for a legal opinion on whether it violates the statute. If Rusinack agrees, a letter goes to the distributor warning him that he will distribute the book at his own risk.
>
> Rusinack says he has a simple test for determining whether a book violated the law.
>
> "*If I feel that I wouldn't want my 13-year-old daughter reading it, I decide it's illegal,*" Rusinack said. "Mind you, I don't say that it is illegal in fact. I merely say that in my opinion it would be a violation of the law to distribute it. The distributors usually co-operate by withholding the book."

Detroit News, May 5, 1955, p. 16, col. 1. (Emphasis added.) Since Rusinack's daughter was 13 in May, 1955, she must have been 11 or 12 when *The Devil Rides Outside* was submitted to this process.

[52] For some reason, Butler's lawyer didn't want these facts brought out at the trial. By proper objection, he excluded all of them except the exhibit of excerpts from the book. Record, pp. 17–18, 21–23.

[53] See Lockhart & McClure, *supra* note 1, at 319; Memorandum for Metropolitan Detroit Branch of the American Civil Liberties Union as Amicus Curiae, pp. 9–12.

[54] The court, without analysis or explanation, simply "found" that the Michigan statute was constitutional and that the state had a right to pass the statute under its police power for the purpose of protecting the health and welfare of its citizens and its youth. Record, p. 231.

[55] The court found "that the language *contained* in the book is obscene and immoral and lewd and lascivious, and is such that it tends to incite *minors* to violent or depraved acts, to the corruption of the morals of *youth*." *Ibid.* (Emphasis added.) But further on in its oral opinion the court muddied the "containing" issue, finding that "even viewing the book as a whole, it [the objectionable material] was not necessary to the proper development of the theme of the book nor of the conflict expressed therein." *Id.* at 232. This may explain why the United States Supreme Court did not reach the "containing" issue, for in the oral argument it became clear that Mr. Justice Reed believed the trial court had considered the book as a whole. 25 U.S.L. WEEK 3117 (1956). See note 61 *infra*. For an analysis of this constitutional issue, see pp. 88–95 *infra*.

On his appeal to the United States Supreme Court, Butler contended that the Michigan statute[58] violated the first and fourteenth amendments to the Constitution of the United States for three reasons: first, because it prohibited the sale to an adult of a book unsuitable for minors; second, because its prohibitions were too vague and indefinite; and, third, because it prohibited the sale of a book "containing" obscene language and descriptions, thereby precluding consideration of the book as a whole.[59] In a unanimous decision[60] the Court reversed Butler's conviction, relying solely upon Butler's first point to invalidate the statute.[61] In a brief opinion by Mr. Justice Frankfurter, the Court ruled that the state cannot quarantine "the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence. Surely, this is to burn the house to roast the pig."[62] Mr. Justice Frankfurter pointed out that Butler was not convicted for selling to a child under a narrower Michigan statute[63] specifically aimed at the sale of obscene material to children.[64] Instead, he said of the general Michigan obscenity statute:

> We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce

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[56] Record, p. 232.

[57] The case was appealed directly from the decision of the Detroit recorder's court because the Michigan Supreme Court denied Butler's application for leave to appeal. *Id.* at 295–96.

[58] For the text of the statute, see note 46 *supra*.

[59] Brief for Appellant, p. 6; Jurisdictional Statement, pp. 3–4. For the state's proposed "Counter-Statement of Questions Presented," see Brief for Appellee, pp. 4–5.

The Detroit Branch of the American Civil Liberties Union also tried to raise the prior restraint issue inherent in the Detroit censorship operation. See Memorandum for Metropolitan Detroit Branch of the American Civil Liberties Union as Amicus Curiae, pp. 17–18.

[60] And an almost unanimous opinion. All but Mr. Justice Black concurred in the opinion; he concurred in the result. Butler v. Michigan, 352 U.S. 380, 384 (1957).

[61] The Court explicitly by-passed appellant's other two points. *Id.* at 382.

[62] *Id.* at 383.

[63] The Court referred to MICH. STAT. ANN. §§ 750.142 & 750.143 (1938). The former prohibits the sale to a minor child of "any book . . . or other thing, containing obscene language . . . or descriptions tending to the corruption of the morals of youth . . . ." The latter prohibits the exhibition upon "any public street or highway, or in any other place within the view of children passing on any public street or highway, any book . . . or other printed paper or thing containing obscene language . . . or descriptions tending to the corruption of the morals of youth . . . ."

[64] This point was emphasized in the oral argument before the Court. Mr. Justice Harlan asked Butler's counsel, "If the statute were limited to sales to minors you would have a different case?" The counsel replied, "Yes, and I would have a much harder case." 25 U.S.L. WEEK 3117 (1956).

> the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensible conditions for the maintenance and progress of a free society.[65]

Michigan's response to the *Butler* decision was prompt; within a few months it repealed the unconstitutional statute and substituted in its place a typical obscenity statute.[66] But the *Butler* decision did not put an end to Detroit's censorship operation, which continued unabated until publishers secured an injunction that effectively stopped it.[67]

Florida's response to *Butler* was almost as prompt as Michigan's. Within a few days after Michigan had acted, the Florida legislature amended its basic obscenity statute, which was virtually a carbon-copy of the unconstitutional Michigan statute.[68] The amendment was very much like Michigan's new statute.[69] Maine, too, reacted with reasonable dispatch. It repealed its *Butler*-type statute and enacted in its place a law prohibiting the sale to minors under 18 years old of "any pamphlet, magazine, comic book, picture, picture book which contains fictional illustrations of sadism, masochism, sexual perversion, bestiality, or lust, or of physical torture of human beings."[70] Then, realizing that this left the state without any general obscenity law governing sales to persons over

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[65] Butler v. Michigan, 352 U.S. 380, 383–84 (1957).

[66] MICH. STAT. ANN. § 28.575(1) (Supp. 1959). This repealing and substitutional statute was finally enacted on June 13, 1957.

[67] See text accompanying notes 14 & 15 *supra*. The following year Michigan's legislature enacted a statute designed to reactivate the system. MICH. STAT. ANN. § 27.1410 (Supp. 1959). See Publishers' Wkly, May 26, 1958, vol. 173, p. 32.

[68] FLA. STAT. ANN. § 847.01 (1944).

[69] Fla. Laws 1957, ch. 57–779, § 1, at 1103–04. The amendment was finally enacted June 20, 1957.

The 1957 amendment added a new provision prohibiting sales to minors under 17 years of age. It prohibits the sale of any book or magazine, among other things, "the cover or contents of which exploits, openly suggests, or is partly or wholly devoted to illicit sex or sexual immorality."

Florida's relatively swift action may have been prompted by State v. Clein, 93 So. 2d 876 (Fla. 1957). In that case, the publisher of *Miami Life* was charged with a violation of the old Florida obscenity statute in the publication of a news item on April 30, 1955, about an incident involving a white girl and a Negro man. The trial court granted defendant's motion to quash the information, and the state appealed. While the appeal was pending, the *Butler* case was decided. The Florida Supreme Court reversed the order granting the motion to quash, but one of the justices, in a separate concurring opinion, pointed out that the reversal was without prejudice to the defendant's right to challenge the constitutionality of the statute. He was the only Florida justice to refer to the *Butler* case.

[70] Me. Laws 1957, ch. 321, § 1 at 276. The statute was finally enacted on August 28, 1957.

18 years of age, the Maine legislature amended it to prohibit sale of the described material to any person, regardless of age.[71]

Other states were much slower to react. Rhode Island and Virginia put their statutory houses in order only after courts in both states invalidated *Butler*-type statutes.[72] Rhode Island amended its statute by deleting the unconstitutional phrase "manifestly tending to the corruption of the morals of youth" to bring it into line with the *Butler* decision.[73] Virginia repealed its unconstitutional statute and enacted a comprehensive statute governing obscenity.[74]

Still other states acted as if the *Butler* case had never been decided. Vermont and West Virginia amended *Butler*-type statutes to increase the penalties for violation without troubling to remove their constitutional infirmities,[75] while Iowa, South Carolina, Texas, and Utah have apparently done nothing at all about their unconstitutional statutes.[76]

B. JUNE 24, 1957: THE ROTH, ALBERTS, KINGSLEY BOOKS, AND ADAMS CASES

Within a few months the two questions that went unanswered in the *Butler* case[77]—and some additional issues not raised in that case—were resolved in a series of decisions handed down on June 24, 1957.[78]

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[71] Me. Rev. Stat. Ann. ch. 134, § 24 (Supp. 1959). This amendment also added films to the list of materials and deleted the "fictional" requirement.

[72] The Rhode Island statute was R.I. Gen. Laws Ann. ch. 11, § 11–31–1 (1956). It was held unconstitutional by a superior court judge. See 39th ACLU Ann. Rep. 16 (1959).

The Virginia statute, Va. Code Ann. § 18–113 (1950), was held unconstitutional in Goldstein v. Commonwealth, 200 Va. 25, 104 S.E.2d 66 (1958).

[73] R.I. Gen. Laws Ann. ch. 86, § 1 (Supp. 1959).

[74] Va. Code Ann. §§ 18.1–227—18.1–236.3 (Supp. 1960). See Comment, 17 Wash. & Lee L. Rev. 322, 327–28 (1960).

[75] 13 Vt. Stat. § 8490 (1947) was amended by Vt. Laws 1957, No. 87, to permit both fine and imprisonment rather than fine or imprisonment. See 13 Vt. Stat. Ann. § 2801 (1958). W. Va. Code Ann. § 6066 (1955) was amended by W. Va. Acts 1959, ch. 38, to increase the penalty for a second violation. See W. Va. Code Ann. § 6060 (Supp. 1960).

The West Virginia statute was saved from total destruction because, in addition to the unconstitutional phrase "manifestly tending to corrupt the morals of youth," it spoke of material "tending to corrupt the public morals." The West Virginia Supreme Court severed the statute, upholding the portion of the statute that prohibited the sale of matter containing obscenity "tending to corrupt the public morals." State v. Miller, 112 S.E.2d 472 (W. Va. 1960).

[76] For the statutory references, see Lockhart & McClure, *supra* note 1, at 339 n.303.

[77] See text accompanying notes 59–61 *supra*.

[78] Roth v. United States [and Alberts v. California], 354 U.S. 476 (1957); Adams Newark Theater Co. v. City of Newark, 354 U.S. 931

1. Roth-Alberts

Samuel Roth, until his most recent conviction, was an experienced dealer in not-very-erotic erotica.[79] Among the materials he advertised and sold through the mails out of New York City were a monthly magazine called *Good Times, A Review of the World of Pleasure* and a quarterly called *American Aphrodite,* issued in bound volumes at ten dollars a volume.[80] After years of investigation by postal inspectors[81] a federal grand jury in New York indicted him, in a 26-count indictment, for violating the federal statute prohibiting the mailing of obscene matter and advertisements for obscene matter.[82]

(1957); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). For an excellent critical analysis of the *Roth-Alberts* opinions, see Kalven, *supra* note 5, at 7–28.

[79] *E.g.,* in Roth v. Goldman, 172 F.2d 788 (2d Cir. 1949), Roth sought to enjoin a postmaster from executing five orders excluding certain matter from the mails. Four of them were fraud orders based upon Roth's mailing of advertisements fraudulently representing four books to be salacious when in fact they were not. The fifth order excluded a book entitled *Waggish Tales From the Czechs,* which the court of appeals described as

> a collection of some ninety-six "waggish tales," supposed to have been brought down to us from another era and another clime, and sold through the mails at the special discount of $10 from the listed $20 per volume. Our task is not made easier, however, when we discover them to be American-made or shared smoking room jests and stories, obscene or offensive enough by any refined standards and only saved, if at all, by reason of being both dull and well known.

Id. at 789. For an analysis of the case, see Lockhart & McClure, *supra* note 1, at 338.

Among the books upon which some of Roth's earlier convictions were based are James Joyce's *Ulysses,* Arthur Schnitzler's *Reigen,* and Sir Richard Burton's translation of *The Perfumed Garden.* Brief for Petitioner, pp. 5–6, Roth v. United States, 354 U.S. 476 (1957).

For an account of Roth's business operations, see MAKRIS, THE SILENT INVESTIGATORS 289–99 (1959).

[80] He also handled various assortments of what appear to have been nude photographs entitled *Wallet Nudes, French Nudes at Play, Stereoptic Nude Show,* and *2 Undraped Stars,* as well as the publications *NUS, Good Times, Photo and Body,* and something called *Chicago Sex-Dimensional Issue.* Record, pp. 2–21.

[81] MAKRIS, *op. cit. supra* note 79, at 290–97.

[82] Record, pp. 2–21. The pertinent provisions of the statute—62 Stat. 768 (1948), 18 U.S.C. § 1461 (1958) read:

> Every obscene . . . book, pamphlet, picture . . . or other publication of an indecent character; and
>
> . . . .
>
> Every . . . circular . . . advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned . . . things may be obtained . . .
>
> . . . .
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails . . . .
>
> . . . .
>
> Whoever knowingly deposits for mailing . . . anything declared by

At the trial, the court charged the jury in terms reminiscent of the old *Hicklin* rule.[83] He told them that the word "obscene" signified "that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts." "The matter," he said, "must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall. It must tend to stir sexual impulses and lead to sexually impure thoughts."[84]

Reminiscent though these words were of the old *Hicklin* rule, the trial court rejected some of the extreme implications of that rule. He instructed the jurors that they must judge the material as a whole, not by detached portions taken out of context, and that they must determine its effect, not upon any particular class of persons, but upon the average person in the community.[85] But he said nothing of the importance of literary or other social values, which were so strongly emphasized in the famed *Ulysses* case;[86] instead, he encouraged the jurors to ignore literary values and to return a verdict based upon the literary taste of the unread man.[87]

The jury apparently took the court's hint. In a puzzling verdict, it found Roth guilty on one count involving only *American Aphrodite,* which had considerable literary stature,[88] and on two

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this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both.

One of the counts—the 26th—was not for a direct violation of § 1461 but rather for a conspiracy to violate that section. Record, pp. 20–21.

[83] Regina v. Hicklin, L.R. 3 Q.B. 360, 371 (1868): "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." See Lockhart & McClure, *supra* note 1, at 325–29.

[84] Record, pp. 25–26.

For an analysis of the problems involved in testing for obscenity by the *effect* a book has upon the *thoughts* of its readers, see Lockhart & McClure, *supra* note 1, at 329–31, 379–82.

[85] Record, pp. 25–26.

[86] United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934). See Lockhart & McClure, *supra* note 1, at 327–28, 347–48, 393.

[87]

> You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.

Record, p. 26.

> The defendant also introduced in evidence certain books, bestsellers, and excerpts therefrom, as some evidence of the current reading habits of the public . . . . You may consider and compare the number of people who read these books with the number of people who make up our community, and it may be your judgment that some or all of the books introduced by the defendant are obscene themselves. . . .

Id. at 27. In short, don't judge the books by the standards of those who read books; do judge them by the standards of those who don't.

Roth did not take substantial exception to the charge. See *id.* at 29.

[88] The particular issue of *American Aphrodite* was volume 1, number 3, as correctly stated in count 24; the reference to "Number Thirteen" in

counts involving advertisements for *American Aphrodite* and other material, but acquitted him on all counts involving assortments of nude photographs bearing such alluring titles as *French Nudes at Play.*[89] Then the court sentenced him to five years and $5,000.[90] And the court of appeals, with Judge Frank's reluctant concurrence,[91] affirmed Roth's conviction.[92]

In the United States Supreme Court Roth raised eight issues, four of which were important and four trivial.[93] The four im-

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count 17 appears to be a typographical error. See Record, pp. 19 & 15 respectively.

Among the distinguished authors whose works appeared in the issue were Herbert Ernest Bates, perhaps best known in the United States for *The Purple Plain*, Rhys Davis, whose *The Trip to London* delighted thousands of its readers, Pierre Louys, famous for *Aphrodite*, and Edwin Beresford Chanceller, author of *The Lives of the Rakes* and many other historical works. Here, too, were pieces by Harold Alfred Manhood, John Cournos, Patrick Kirwan, Henry Miller, and Harry Roskolenko (Colin Ross).

In England, D. Val Baker criticized the Postmaster General's earlier exclusion of *American Aphrodite* from the United States mail, pointing out the genuine literary quality of its contents. Baker, *Aphrodite in Trouble*, 168 Publishers' Circular and Booksellers' Record 924 (1954).

[89] Record, pp. 1–19; Brief for the United States in Opposition, pp. 12–13.

The count involving only *American Aphrodite* was count 24. The counts involving advertisements for *American Aphrodite* and other material included circulars advertising the magazines *Good Times* and, in one of the counts, *Photo and Body*; these were counts 10 and 17. The Record does not show that the advertisement for *American Aphrodite* was included in count 10; this fact appears in the government's brief in opposition. The jury, however, acquitted Roth on three counts involving *Photo and Body* and on 12 counts involving *Good Times*. It also acquitted Roth on 2 counts involving advertisements for *American Aphrodite*. Record, pp. 1–19.

There was a fourth count on which the jury found Roth guilty—count 13. This count involved only an advertisement for *Good Times*, vol. 1, no. 8. But the jury acquitted Roth on a count for mailing that particular issue and also acquitted him on numerous counts for mailing other advertisements for the magazine. *Id.* at 1–19.

Since the count involving only *American Aphrodite* included both the book itself and advertisements for it, the sole element of consistency in the verdict is the conclusion that the book itself was obscene.

[90] *Id.* at 1–2.

[91] See Professor Kalven's delightful twin-review of Judge Frank's appendix to his concurring opinion and of St. John-Steras' *Obscenity and the Law*. 27 Library Quarterly 201 (1957). Judge Frank doubted the constitutionality of the statute and invited Supreme Court review, but believed that "since ours is an inferior court, we should not hold invalid a statute which our superior has thus often said is constitutional (albeit without any full discussion)." United States v. Roth, 237 F.2d 796, 804 (2d Cir. 1956).

[92] United States v. Roth, 237 F.2d 796 (2d Cir. 1956).

[93] The four trivial issues were petitioner's questions 4–7. See Petition for a Writ of Certiorari, p. 2. They dealt with such matters as the district attorney's argument to the jury, the admission of evidence procured by postal inspectors who used aliases in responding to Roth's advertisements, and the trial court's instructions to the jury. See United States v. Roth, 237 F. 2d 796, 799–801 (2d Cir. 1956) for the court of appeals' summary disposition of most of these questions.

portant issues were whether the federal obscenity statute[94] violated the freedom of speech and press guarantees of the first amendment, was too vague to meet the requirements of the due process clause of the fifth amendment, improperly invaded the powers reserved to the states and the people by the first, ninth, and tenth amendments, and, finally, whether the publications considered as a whole were obscene.[95] Of these issues, Roth belabored only the first three;[96] he advanced so perfunctory an argument on the last[97] that the government did not respond to it.[98] With the case in this posture, it is not surprising that the Supreme Court disregarded the trivial issues and, in granting a writ of certiorari, limited the writ to the first three of the four important issues that were raised, eliminating from the case any consideration of the application of the statute to *American Aphrodite*.[99]

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[94] 18 U.S.C. § 1461 (1948). For the relevant text of the statute, see note 81 *supra*.

[95] These were petitioner's questions 1–3 and 8. See Petition for a Writ of Certiorari, pp. 2–3.

[96] See *id.* at 12–32.

[97] Roth's argument on this question consisted of little more than the bare assertions that *American Aphrodite* was not obscene, that the publications in the case contained nothing objectionable, and that the jurors could not have read the entire volume of *American Aphrodite* before reaching a verdict. See *id.* at 55–57; Petitioner's Reply Brief, pp. 2–3.

[98] The Brief for the United States in Opposition countered all of Roth's arguments on the other issues but said not a word on this one. Perhaps the government recognized that this was its most vulnerable point in the case and so ignored it in the hope that it would be overlooked; for, surely, had the question been squarely met and argued, the government's position would have appeared only slightly less ridiculous than that of the Postmaster General in his attempts to censor Aristophanes' *Lysistrata.* See note 88 *supra* for a description of the literary stature of *American Aphrodite's* contents.

[99] It is clear that, despite his literary pretensions, Roth was caught at the trial with his literary breeches down and never managed to pull them up again—if indeed they had ever been up in the first place.

For example, the particular volume of *American Aphrodite* in issue at the trial contained Aubrey Beardsley's *Venus and Tannhauser,* also known as *Under the Hill.* At the trial the government introduced, apparently without objection, a copy of Haldane MacFall's biography of Aubrey Beardsley. In the book, MacFall, a British army officer who liked to write on the side, chastised the "jackals" who had "egged him (Beardsley) on to base ends and . . . sniggered at his obscenities" and who, after Beardsley's death, published works he had been trying to keep from publication during his lifetime. Petition for a Writ of Certiorari, pp. 52–53. The government used the book in its cross-examination of Roth and in its summation to the jury, in an effort to establish that Beardsley's *Venus and Tannhauser* was somehow a shamefully obscene work and that its other title—*Under the Hill*—was further evidence of that fact. *Id.* at 52–53.

All of this caught Roth flat-footed; the best he could do in response was to argue that the government's conduct was so inflammatory and prejudicial as to deprive him of a fair trial. *Id.* at pp. 51–55; Petitioner's Reply Brief, pp. 5–6. He made no effort to point out that Beardsley's *Under the Hill and Other Essays in Prose and Verse* was first published in 1903 by John Lane of London, and by Dodd, Mead and Company of New York, and that it has been reprinted at least three times since then—in 1912, 1921, and

The *Alberts* case wound up in the United States Supreme Court in almost identical posture, though of course it arrived there by a different route.

David S. Alberts and his wife, Violet E. Stanard Alberts, operated a mail order business in Los Angeles.[100] Unlike Roth, they had no literary pretentions whatever: although they handled a number of the Haldemann-Julius booklets, some of which had redeeming social value,[101] they apparently specialized in bizarre

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1928. Nor did he make any use of Arthur Symons' account of how *Under the Hill* was written and first published.

In his short biography of Beardsley, Symons—the distinguished English poet—describes how he first met Beardsley in 1895 and how in that year Beardsley worked on the piece in the Casino at Dieppe:

> He was at the work then, with an almost pathetic tenacity, at his story, never to be finished, the story which never could have been finished, *Under the Hill*, a new version, a parody (like Laforgue's parodies, but how unlike them, or anything!) of the story of Venus and Tannhauser. . . . The fragment published in the first two numbers of the *Savoy* had passed through many stages before it found its way there, and would have passed through more if it had ever been carried further. Tannhauser, not quite willingly, had put on Abbe's disguise, and there were other unwilling disguises in those brilliant, disconnected, fantastic pages, in which every sentence was meditated over, written for its own sake, and left to find its way in its own paragraph. It could never have been finished, for it had never really been begun; but what undoubted, singular, literary ability there is in it, all the same!

SYMONS, AUBREY BEARDSLEY 9–10 (1898). See also note 88 *supra*, for some indication of the literary stature of most of the authors whose works appeared in the volume.

Although in this posture of the case it is not surprising that the Court did not include the question of the obscenity of *American Aphrodite* in its grant of the writ of certiorari, it is astonishing—perhaps even disconcerting—that of the 13 judges involved in the case only one, Mr. Justice Harlan, recognized that *American Aphrodite* was not in fact pornographic. See Roth v. United States, 354 U.S. 476, 508 (1957). Chief Judge Clark of the Court of Appeals observed:

> We can understand all the difficulties of censorship of great literature, and indeed the various foolish excesses involved in the banning of notable books, without feeling justified in casting doubt upon all criminal prosecutions, both state and federal, of commercialized obscenity. A serious problem does arise when real literature is censored; but in this case no such issues should arise, since the record shows only salable pornography.

Roth v. United States, 237 F.2d 796, 798–99 (2d Cir. 1956).

[100] Record, pp. 100–02, Alberts v. California, 354 U.S. 476 (1957). Alberts was in charge of the business and supervised and directed his wife's activities.

Mr. and Mrs. Alberts had for some time been carrying on a running battle with the Post Office Department under Mrs. Alberts' maiden name, Violet Stanard. See Stanard v. Olesen, 121 F. Supp. 607 (S.D. Cal. 1954), *application to enjoin temporary impounding order denied* 74 Sup. Ct. 768 (1954); Olesen v. Stanard, 227 F.2d 785 (9th Cir. 1955).

[101] Among the choice titles were *Homosexual Life, Wild Women of Broadway, Confessions of a Minister's Daughter*, and *Petting as an Erotic Exercise*. Record, pp. 25–28, 107. But the list also included Gautier's *Fleece of Gold*.

photographs of nude and scantily-clad women.[102] After deputy sheriffs, armed with a search warrant, raided the Alberts' office and warehouse and seized hundreds of items,[103] the Alberts were charged with lewdly keeping obscene materials for sale and advertising obscene materials in violation of the California obscenity statute.[104] They were tried, without a jury, in the Beverly Hills municipal court, which found Mr. Alberts guilty, sentenced him to 60 days and $500, and put him on probation for two years.[105] Mrs. Alberts, because she acted under her husband's direction, was acquitted.[106] The appellate department of the superior court, in a brief opinion, affirmed Alberts' conviction.[107]

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[102] Most of these were sado-masochistic photographs commonly known as bondage and torture pictures. *Id.* at 27–28, 39–40. Others were of Holstein-like women; the trial judge described one of them:

> There is another one of a nude girl facing the camera, and there is a table or a counter before her on which there are two champagne glasses, and she has one breast in each of the two glasses—large breasts.

Id. at 91. In addition, the Alberts handled a number of sado-masochistic books bearing such titles as *Memoirs of a Spankee* and *Slaves of the Lash. Id.* at 55. See Brief for Appellee, pp. 49–59, for a description of the various materials handled by the Alberts.

[103] Record, pp. 24–42.

[104] *Id.* at 1–3. They were also charged with keeping obscene recordings for sale and with being lewd and dissolute persons, but these charges were dismissed for lack of proof. *Id.* at 80.

The relevant provisions of the California obscenity statute read:

> Every person who wilfully and lewdly, either:
>
> . . . .
>
> 3. . . . keeps for sale, or exhibits any obscene or indecent writing, paper, or book . . . or
>
> 4. . . . publishes any notice or advertisement of any such writing, paper, book, picture, print or figure;
>
> . . . .
>
> 6. . . . is guilty of a misdemeanor.

CAL. PEN. CODE ANN. § 311 (1955).

[105] Record, pp. 5, 117–18.

The standards applied by the trial court in finding Alberts guilty are not altogether clear, for nothing was said about them at that time. *Id.* at pp. 116–17. On an earlier motion to dismiss, the court addressed itself to Alberts' trial brief and engaged in a rambling account of standards for determining obscenity that ranged from dictionary definitions of "obscene" and "indecent," through the *Hicklin* rule, to the *Ulysses* case. The court also spoke of People v. Wepplo, 78 Cal. App. 2d 959, 178 P.2d 853 (1947), in which the standard was said to be whether the material "has a substantial tendency to deprave or corrupt its reader by inciting lascivious thoughts or arousing lustful desires." Record, pp. 80–83, Alberts v. California, 354 U.S. 476 (1957). But the court did not give any clear indication of the particular standard it employed in ruling on the motion. See *id.* at 83–93.

If, as the United States Supreme Court thought (354 U.S. at 486), the trial court applied the test laid down in People v. Wepplo, 78 Cal. App. 2d 959, 178 P.2d 853 (1947), additional similarities between the *Roth* and *Alberts* cases appear; for the court in the *Wepplo* case rejected the "extreme" "liberality" of the *Ulysses* standard and disregarded literary values. *Id.* at 962, 178 P.2d at 856. See notes 86 & 87 *supra* and accompanying text for other similarities.

[106] Record, pp. 117–18.

[107] People v. Alberts, 138 Cal. App. 2d 909, 292 P.2d 90 (1955).

On appeal to the United States Supreme Court Alberts had trouble framing his issues. In his Jurisdictional Statement he set out two: (1) whether the statute "upon its face and as construed and applied" violated "procedural and substantive due process of law" and abridged "freedom of speech, press and thought" and (2) whether the statute "as applied here to the *mailing* of circulars and the keeping of books for sale by *mail*" infringed on an area pre-empted by the federal government.[108] In his Brief for the Appellant, however, Alberts rephrased the first issue so as to present three grounds for his contention that the statute "on its face and as construed and applied" violated the first and fourteenth amendments. These grounds were: (1) that the statute prohibited "books fairly within the area protected by the freedom of speech and press provisions of the Constitution, particularly when the legality of the book is measured by its effect upon the *thoughts* and *desires* of its readers," (2) that the statutory provisions were "so elastic and far reaching as to encompass virtually all literature and art, thus giving censorial control of free expression to the trier of fact," and (3) that the statute was unconstitutionally vague.[109] Despite the opportunity open to him to challenge the application of the statute to the materials actually involved in the case, Alberts did not do so until it was too late;[110] indeed, almost to the very last, he disclaimed raising that issue.[111]

So both the *Alberts* and *Roth* cases reached the United States Supreme Court at a very high level of abstraction—a level so high that the facts of the two cases had become literally irrelevant. And both were argued on this level.[112]

Seen in this light, the basic issues before the Court were whether the federal and California obscenity statutes, *on their faces and in a vacuum,* violated the freedom of expression guarantees and the definiteness requirements of the United States Constitution.[113]

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[108] Jurisdictional Statement, pp. 4–5.

[109] Brief for Appellant, p. 7.

[110] Only in his reply brief did Alberts advance any argument that the books he handled were not obscene. Appellant's Reply Brief, pp. 19–20. Apparently his argument came too late to merit the Court's consideration. See Alberts v. California, 354 U.S. 479, 481 n.8 (1957).

[111] In his principal brief, Alberts stated:

> The statute, as we shall endeavor to demonstrate, is so broad in scope as to permit a limitless inhibition of speech and press. Consequently, we do not actually reach the question of "particular application."

Id. at 31. Then, in a footnote, Alberts denied any concession that the materials in the case were obscene. *Id.* at 31 n.8. See also note 110 *supra.*

[112] An exception is Albert's belated contention that some of the books he handled were not obscene. *Ibid.*

[113] We dismiss, as irrelevant to our subject, the federalism issue raised in the cases. For the Court's summary disposition of this issue, see Roth v. United States, 354 U.S. 476, 492–94 (1957).

But it is hard to decide cases in a vacuum, without relation to their factual settings, though the Court sometimes for good reasons has done so,[114] and the Department of Justice moved swiftly to bring the cases down to earth again.

In his brief for the United States, the Solicitor General set up three categories of material "actually caught in the net of the federal obscenity statute."[115] The first category, he said, comprised "novels of apparently serious literary intent," like Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn,* caught because "they concentrate on explicit discussion of sex conduct in a vocabulary based on four-letter words." They constitute less than two per cent of the items for which persons are convicted under the statute.[116] The second category he described as borderline material, primarily photographic, that accounted for less than 10 per cent of matter caught in the statute's net.[117] The final category, constituting 90 per cent of the total encompassed by the statute, comprised what he described as "black-market" or "hard-core" pornography—erotic objects and books, pamphlets, photographs, and motion pictures depicting normal and abnormal sexual activity.[118] Then, to make sure that the Court understood what he meant by "hard-core pornography," the Solicitor General sent to the Court a carton containing numerous samples of actual hard-core pornography.[119]

This must have brought the cases back to earth abruptly, and it must also have assured a decision favorable to the constitutionality of both the federal and the California obscenity statutes. For hard-core pornography is so foul and revolting that few people can contemplate the absence of laws against it—that would be unthinkable. But, in returning to earth the cases landed on ground from which they had not taken off.[120]

This was the setting in which the Supreme Court upheld the constitutionality of the federal and California obscenity statutes and, without passing on the merits of the materials actually involved in either case,[121] affirmed the convictions of both Roth and Alberts. The statutes, the court held, did not violate the freedom of expression and definiteness requirements of the United States Constitution.[122]

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[114] Note, *United States Supreme Court's Rules of Self-Limitation As Applied to the Fundamental Rights of the First Amendment,* 33 MINN. L. REV. 390 (1949).

[115] Brief for the United States, p. 34.

[116] *Id.* at 35.

[117] *Id.* at 35–37.

[118] *Id.* at 37–39.

[119] Letter From the Solicitor General to the Clerk of the United States Supreme Court, April 19, 1957; Lewis, *Censorship Limited in "Obscenity" Cases,* N.Y. Times, Jan. 19, 1958, § E, p. 9, col. 6.

[120] There was little or no evidence in either case of hard-core pornography, though Alberts must have come at least very close to the line with his sado-masochistic books and pictures. See note 102 *supra.* The Solicitor General conceded that Roth's material fell only into the second category—borderline matter—and did not claim that any of it amounted to hard-core pornography. Brief for the United States, p. 36.

In the *Roth-Alberts* majority opinion,[123] Mr. Justice Brennan wrote that "obscenity is not within the area of constitutionally protected speech or press"[124] because obscenity is "utterly without redeeming social importance."[125] But he went on to point out that "sex and obscenity are not synonymous . . . [and the] portrayal of sex, *e.g.*, in art, literature and scientific works . . . [is entitled to] the constitutional protection of freedom of speech and press"[126] so long as it does not fall into the category of obscenity. Stressing the importance of sex as a "subject of absorbing interest to mankind through the ages" and "one of the vital problems of human interest and public concern,"[127] Mr. Justice Brennan concluded: "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."[128]

The opinion thus sought to separate protected from unprotected material by use of the term "obscenity" as the label for the unprotected. It then set up as an approved test for obscenity "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[129]

Each of the four Justices who did not join in the majority opinion agreed with the majority that the freedom of expression guarantees of the Constitution applied to material relating to sex. But Justices Douglas and Black, dissenting in both cases, argued against all obscenity censorship except where it can be demonstrated that "the particular publication has an impact on action that the government can control."[130]

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[121] "No issue is presented in either case concerning the obscenity of the material involved." Roth v. United States, 354 U.S. 476, 481 n.8 (1957).

[122] *Id.* at 492. The Court also held, in *Roth*, that the power to punish obscenity is not vested exclusively in the states and, in *Alberts*, that the federal government had not so pre-empted the area as to preclude California's punishment of persons keeping obscene material for sale, or for advertising it through the mails. *Id.* at 492–94. See note 113 *supra.*

[123] By Mr. Justice Brennan, joined by Justices Frankfurter, Burton, Clark, and Whittaker.

[124] Roth v. United States, 354 U.S. 476, 485 (1957).

[125] *Id.* at 484.

[126] *Id.* at 487.

[127] *Ibid.*

[128] *Id.* at 488.

[129] *Id.* at 489.

Mr. Justice Harlan, concurring in *Alberts* but dissenting in *Roth,* wanted to limit federal obscenity censorship strictly to hard-core pornography[131] but to grant the states somewhat broader censorship powers, the limits of which he did not spell out.[132] And he made very clear his genuine concern for effective constitutional protection against both federal and state obscenity censorship, persuasively objecting that the majority's approach would result in insulating the crucial issue in obscenity cases from independent constitutional judgment by entrusting the fact finder with the responsibility of determining whether particular material is "obscene."[133] He argued that reviewing courts, including the United States Supreme Court, must determine for themselves by independent perusal of the material "whether the attacked expression is suppressible within constitutional standards."[134] Then, practicing what he preached, Mr. Justice Harlan examined the materials involved in both cases; in *Roth* he found that the material fell short of hard-core pornography and so voted to reverse Roth's conviction,[135] but in *Alberts* he concluded that the material was such that its suppression would not so "interfere with the communication of 'ideas' in any proper sense of that term" as to offend due process, and agreed with the Court in its affirmance of Alberts' conviction.[136]

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[130] *Id.* at 511.

[131] See text accompanying note 118 *supra.*

[132] See Roth v. United States, 354 U.S. 476, 500–08 (1957).

> The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. . . . The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both the letter and spirit of the First Amendment.

Id. at 506.

[133] *Id.* at 497–98. Mr. Justice Harlan illustrated his point that the determination of censorable obscenity is "not really an issue of fact but a constitutional *judgment* of the most sensitive and delicate kind," by the following comment, which also suggested the narrow bounds within which he would confine censorship:

> Many juries might find that Joyce's "Ulysses" or Bocaccio's "Decameron" was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are "utterly without redeeming social importance."

Id. at 498.

[134] *Id.* at 497. For discussion of the scope of judicial review, see pp. 114–20 *infra.*

[135] *Id.* at 508. See notes 80, 88 & 99 *supra* for a description of the material involved in *Roth.*

Chief Justice Warren, in a short opinion concurring in result, revealed that he would give some constitutional protection to material relating to sex, but he did not disclose what constitutional standard he would apply. The central issue in obscenity cases, he wrote, is not "the obscenity of a book or picture" but the "conduct of the defendant."[137] "The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting."[138] He voted to affirm the convictions of both Roth and Alberts because they "were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers" and "were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect."[139] It seems clear that, when a defendant's conduct is not personally reprehensible, Chief Justice Warren would give constitutional protection to sexual materials.[140]

2. *Kingsley Books*

In the *Kingsley Books* case the New York City corporation counsel sued to enjoin Kingsley and several other book dealers from selling a series of obscene books appropriately entitled *Nights of Horror*.[141] The trial court found the books obscene and granted the injunctions, but carefully limited the decree to the volumes already published.[142] The New York Court of Appeals unanimously affirmed the judgment.[143]

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[136] *Id.* at 503. See notes 101 & 102 *supra* for a description of the material involved in *Alberts.*

[137] *Id.* at 495.

[138] *Ibid.*

[139] *Id.* at 495–96.

[140]

> [The social problem presented by obscenity] does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments.

Id. at 495.

We surmise, for example, that the Chief Justice would give constitutional protection to Haldeman-Julius were he ever to be prosecuted for publishing the booklets handled by Alberts. See Time, Aug. 15, 1960, p. 38 for an account of the Haldeman-Julius enterprise.

[141] Record, pp. 7–9, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

The proceedings were instituted under New York Code of Criminal Procedure, § 22-a, which provided for post-publication injunctions (after a judicial hearing) against obscene matter.

In the United States Supreme Court, as in the New York Court of Appeals, the sole issue was whether the statute imposed an unconstitutional prior restraint upon publications.[144] Kingsley and the other book dealers did not challenge the trial court's finding that the books were in fact obscene;[145] indeed, they could scarcely have done so, for the books clearly fell into the category of hard-core pornography.[146] The Court, in a five-to-four decision,[147] sustained the statute but added nothing of importance to the central problem with which this article is concerned—the standards for determining what materials are constitutionally subject to obscenity censorship.

3. *Adams Newark Theatre*

In Newark, New Jersey, the city's director of public safety had trouble with burlesque shows. He once, without a hearing and without evidence of what kind of show the Adams Theatre would put on, denied Adams' application for a license to operate a burlesque theatre. When the New Jersey courts firmly put a stop to that practice,[148] the city fathers amended the city's ordinances to prohibit "lewd, obscene, or indecent" shows and performances,[149] specifying in detail a number of forbidden acts.[150] Adams and I. Hirst Enterprises, both of whom operated licensed burlesque theaters in Newark, sought a declaratory judgment that the amended ordinances were unconstitutional.[151] They won on a motion for summary judgment in the state superior court,[152] but lost on appeal to the New Jersey Supreme Court, which upheld the constitutionality of the ordinances.[153]

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[142] Record, pp. 13–14; Burke v. Kingsley Books, Inc., 208 Misc. 150, 142 N.Y.S.2d 735 (1955).

[143] Brown v. Kingsley Books, Inc., 1 N.Y.2d 177, 134 N.E.2d 461 (1956).

[144] Statement as to Jurisdiction, p. 2; Brief of Appellant, p. 4. See Brown v. Kingsley Books, Inc., 1 N.Y.2d 177, 180, 134 N.E.2d 461, 462 (1956). When the New York Civil Liberties Union sought to inject issues of vagueness and of clear and probable danger, Brief for the New York Civil Liberties Union as Amicus Curiae, pp. 3–6, appellants repudiated these issues. Supplemental Brief of Appellants, pp. 6–7.

[145] Supplemental Brief of Appellants, pp. 6–7.

[146] The trial court—Justice Matthew M. Levy—gave the following description of the books:

> "*Nights of Horror*" makes but one "contribution" to literature. It serves as a glossary of terms describing the private parts of the human body . . . the emotions sensed in illicit sexual climax and various forms of sadistic, masochistic and sexual perversion . . . . Perverted sexual acts and macabre tortures of the human body are repeatedly depicted . . . . These gruesome acts included such horrors as cauterizing a woman's breast with a hot iron . . . completely singeing away the body hairs . . . *ringing* the nipples of the breast with needles . . . Sucking a victim's blood was pictured . . . and putting honey on a girl's breasts, vagina and buttocks—and then putting hundreds of great red ants on the honey.

Burke v. Kingsley Books, Inc. 208 Misc. 150, 158–59, 142 N.Y.S.2d 735, 742–43 (1955). And these, Justice Levy added, were not the "most sordid features" of the books. *Id.* at 159, 142 N.Y.S.2d at 743.

[147] Mr. Chief Justice Warren, and Justices Brennan, Black, and Douglas dissented. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445–48 (1957).

[148] See Adams Theater Co. v. Keenan, 12 N.J. 267, 96 A.2d 519 (1953), opinion by Mr. Justice Brennan.

On appeal to the United States Supreme Court, the appellants raised two issues—vagueness and freedom of expression.[154] And once again these issues were presented to the court at a high level of abstraction,[155] for Adams and Hirst had instituted their action before the city had made any attempt to enforce the ordinances.[156] The Court, in a brief per curiam decision, summarily affirmed the judgment of the New Jersey Supreme Court, citing only the *Kingsley, Roth,* and *Alberts* cases.[157]

And so on this last Monday in June, 1957 the censors enjoyed a clean sweep. Those who favored censorship were understandably encouraged by the day's decisions; they saw in them a victory for the cause of decency and looked forward to a rosy future for censorship of obscene materials.[158] But others—mostly law students commenting in law reviews—took a more jaundiced view of the decisions; some of them thought the Court's verbal formula for determining what is obscene, as stated in the *Roth* and *Alberts* opinion,[159] was far too vague and feared that "censors will have a field day as a result of this decision."[160] Both were mistaken, for the Court promptly began to demonstrate that it had really placed very tight limits on what constitutionally may be censored as obscene.[161]

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[149] The amended ordinances applied to theater licensees and performers. Statement as to Jurisdiction, pp. 26–31, Adams Newark Theater Co. v. City of Newark, 354 U.S. 931 (1957).

[150] They were:

> The removal by a female performer in the presence of the audience of her clothing, so as to make nude, or give the illusion of nudeness, of the lower abdomen, genital organs, buttocks or breasts;
>
> The exposure by a female performer in the presence of the audience, or the giving of the illusion of nudeness in the presence of the audience, of the lower abdomen, genital organs, buttocks or breasts;
>
> The exposure by a male performer in the presence of the audience of the genital organs or buttocks;
>
> The use by a performer of profane, lewd, lascivious, indecent or disgusting language;
>
> The performance of any dance, episode, or musical entertainment, the purpose of which is to direct the attention of the spectator to the breasts, buttocks or genital organs of the performer.

Id. at 4.

[151] Statement of Appellees Opposing Jurisdiction and Motion to Dismiss or Affirm, pp. 2–3.

[152] Adams Newark Theatre Co. v. City of Newark, 39 N.J. Super. 111, 120 A.2d 496 (L. 1956).

[153] Adams Newark Theatre Co. v. City of Newark, 22 N.J. 472, 126 A.2d 340 (1956).

[154] Statement as to Jurisdiction, p. 5.

[155] See text accompanying notes 112–13 *supra.*

[156] See Statement of Appellees Opposing Jurisdiction and Motion to Dismiss or Affirm, p. 2.

[157] Adams Newark Theater Co. v. City of Newark, 354 U.S. 931 (1957). Justices Black and Douglas dissented; Mr. Chief Justice Warren wanted to note probable jurisdiction and to set the case for argument. Mr. Justice Brennan did not participate.

C. THE PER CURIAM DECISIONS: 1957 TERM

In the next term of court—the October, 1957 term—the United States Supreme Court, in a series of per curiam decisions, disposed of four cases presented to it on mundane levels far below the level of the high-flown abstractions raised in *Roth, Alberts,* and *Adams.*[162] Citing only *Roth* or *Alberts* the Court reversed without opinion four United States Court of Appeals decisions that had upheld obscenity censorship of: (1) the motion picture, *The Game of Love,*[163] (2) an imported collection of nudist and artstudent publications containing many nude photographs,[164] (3) *One—The Homosexual Magazine*,[165] and (4) *Sunshine & Health* and *Sun Magazine*.[166]

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[158] Msgr. Thomas E. Fitzgerald, executive secretary of the NODL, hailed the Court's action, saying, "The cause of decency has been strengthened," and Postmaster General Arthur Summerfield declared, "The Post Office Department welcomes the decision of the Supreme Court as a forward step in the drive to keep obscene materials out of the mails." The Wanderer, July 3, 1957, p. 6, col. 3. See also Text of Catholic Bishops' Plan to Fight Obscenity, N.Y. Times, November 17, 1957, p. 58, col. 1. The *Christian Century* reported that censors had been encouraged by the Court's decision. 74 Christian Century 836 (1957).

[159] See text accompanying note 129 *supra.*

[160] Summers, *Constitutional Protection of Obscene Material Against Censorship as Correlated with Copyright Protection of Obscene Material Against Infringement,* 31 So. Cal. L. Rev. 301, 306 (1958). See also 7 De Paul L. Rev. 111, 113 (1957); 60 W. Va. L. Rev. 89 (1957).

[161] See Lewis, *supra* note 119.

[162] See text accompanying notes 112–13 & 155 *supra.*

[163] Times Film Corp. v. City of Chicago, 355 U.S. 35, *reversing* 244 F.2d 432 (7th Cir. 1957). The court of appeals described "The Game of Love" as follows:

> [T]he thread of the story is supercharged with a series of illicit sexual intimacies and acts . . . [A] flying start is made when a 16 year old boy is shown completely nude on a bathing beach in the presence of a group of younger girls [as a result of a boating accident]. On that plane the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. Under the influence of this experience and an arrangement to repeat it, the boy thereupon engages in sexual relations with a girl of his own age. The erotic thread of the story is carried, without deviation toward any wholesome idea, through scene after scene. The narrative is graphically pictured with *nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted* and thus, by the very fact of omission, emphasized.

244 F.2d 432, 436. (Emphasis added.)

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[164] Mounce v. United States, 355 U.S. 180, *reversing* 247 F.2d 148 (9th Cir. 1957). The court of appeals, in a forfeiture proceeding against the publications, adopted as its own the opinion of the district court, which had found the text unobjectionable but the publications "obscene" apparently because the photographs placed too much emphasis upon front views of nudes:

> Although an avowed purpose of the books is to explain the nudist movement, its principles, and its practices, there are relatively very few photographs of the mixed groups of all ages which ordinarily would be found in a nudist park. The great preponderance of the illustrations depicts shapely, well-developed young women appearing in the nude, mostly in front exposures.

United States v. 4200 Copies Int'l Journal, 134 F. Supp. 490, 494 (E.D. Wash. 1955). Similarly, the issues of *Modelstudier*, "ostensibly" an artist's publication, were apparently found obscene because they "contain[ed] many large closeup, full front-view photographs of nude men and women, plainly showing the genital and pubic areas."

[165] One, Inc. v. Olesen, 355 U.S. 371 (1958), *reversing* 241 F.2d 772 (9th Cir. 1957). The court of appeals had sustained a postal order finding *One—The Homosexual Magazine* non-mailable because "obscene." The latter court observed that the magazine did not live up to its "purpose of dealing primarily with homosexuality from the scientific, historical and critical point of view—to . . . promote among the general public an interest, knowledge and understanding of the problems of variation." One, Inc. v. Olesen, 241 F.2d 772, 777 (9th Cir. 1957). The court pointed to one story in which a "young girl gives up her chance for a normal married life to live with the lesbian," to a poem "about the alleged homosexual activities of Lord Montagu and other British Peers . . . [which] contains a warning to all males to avoid the public toilets while Lord Samuel is 'sniffing around the drains' of Piccadilly," and to notices advising readers where similar material could be obtained. *Ibid.*

[166] Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958), *reversing* 249 F.2d 114 (D.C. Cir. 1957). Here, too, the district court had found obscene nude photographs clearly showing male and female genitalia and pubic areas. Sunshine Book Co. v. Summerfield, 128 F. Supp. 564, 570–73 (D.D.C. 1955). Of one of the photographs found obscene, the district court said:

> On page 29 [of Sunshine & Health for February, 1955] there is a most unusual picture. Here are two women who appear to be in their late twenties or early thirties. The woman to the left appears to be approximately 5 foot 7. She must weigh in the neighborhood of 250 pounds. She is exceedingly obese.
>
> . . . .
>
> She has large, elephantine breasts that hang from her shoulder to her waist. They are exceedingly large. The thighs are very obese. She is standing in snow, wearing galoshes. But the part which is offensive, obscene, filthy and indecent is the pubic area shown.
>
> . . . The hair extends outwardly virtually to the hip bone. It looks to the Court like a retouched picture because the hair line instead of being straight is actually scalloped or in a half-moon shape, which makes the woman grotesque, vile, filthy, the representation is dirty, and the Court will hold that the picture is obscene in the sense that it is indecent, it is filthy, and it is obscene as a matter of fact. . . .

Id. at 571–72.

See Kaplan, *Obscenity as an Esthetic Category*, 20 LAW & CONTEMP.

Although in these per curiam decisions the Court gave no explanation of the grounds for decision—apart from citation of the *Roth* or *Alberts* cases—it seems very clear that the Court was giving constitutional protection to material that in its judgment did not treat sex "in a manner appealing to prurient interest" within the standard for obscenity laid down in the *Roth* and *Alberts* cases.[167] In three of the four cases the Court must have made an independent examination of the materials and found that censorship of the materials violated constitutional requirements, for in these three cases the Court simply "reversed" the court of appeals. It thus terminated the litigation and gave final protection to the materials in question.[168] Only in one of the four did

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Prob. 544, 553 (1955), for one explanation of how the depiction of pubic hair came to be regarded as obscene.

[167] See Roth v. United States, 354 U.S. 476, 487–89 (1957). See also text accompanying note 129 *supra* for the test approved in *Roth-Alberts.*

[168] See Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957); One, Inc. v. Olesen, 355 U.S. 371 (1958); and Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958). For an analysis advancing this point see Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term,* 26 U. Chi. L. Rev. 279, 309–13 (1959).

The reversals, terminating the litigation and thus freeing the materials from obscenity censorship, indicate that the rulings were on the merits against censorship of the materials, for the principal issue before the Court in each of the three cases was the consistency of the obscenity findings with constitutional standards:

1) In the *Times Film* case the major substantive issue was whether the film was obscene by constitutional standards. See Petition for a Writ of Certiorari, p. 10; Brief in Opposition, p. 10; Petitioner's Reply Brief, p. 2. The only other substantive issue related to the scope and meaning of Burstyn v. Wilson, 343 U.S. 495 (1952), but the citation of *Alberts* instead of *Burstyn* indicates that the reversal was based on the obscenity issue, not on the prior restraint or vagueness issues involved in *Burstyn.*

2) In *One, Inc.* the sole substantive issue raised in the petition for certiorari was the claim that, in finding *One—The Homosexual Magazine* to be obscene, the court below failed to apply the proper standard for determining obscenity under the relevant statute, 18 U.S.C. § 1461 (1948). See Petition for a Writ of Certiorari, p. 7. The petition was written before *Roth* and probably for this reason did not make the constitutional claim. The Brief in Opposition, p. 4, urged that the court below had satisfied the *Roth* test. The Supreme Court reversed, thus holding the magazine mailable. Technically, this may not have been a constitutional decision, since the constitutional issue was not formally raised. Yet the problem for decision was the same whether the issue be considered the application of the statutory formulation of "obscenity," under the federal act barring obscene material from the mails, or the application of the constitutional standard of "obscenity" originated in *Roth.* What is significant in the *One, Inc.* case is that the Court citing *Roth* apparently applied the *Roth* standard in determining that the magazine was not obscene.

3) In the *Sunshine* case, the only issue for which *Roth* could have been cited by the Court was Sunshine's contention that the Post Office Department, the district court and the court of appeals all applied standards of obscenity in conflict with *Roth,* and that judged by proper standards the magazines were not obscene. See Petition for Certiorari, p. 29; Brief in Opposition, p. 27. The other substantive issues related to the statutory authority

the Court remand the case "for consideration in the light of Roth v. United States."[169] But whatever their basis, these four per curiam decisions made it clear that the Court was applying the constitutional guarantees of freedom of expression to confine obscenity censorship within very narrow limits indeed.

These developments did not pass unnoticed by federal officials concerned with obscenity censorship.[170] And as most state and lower federal courts began to give a strict reading to the *Roth-Alberts* standard for determining what is obscene,[171] many local

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of the Department, and to the refusal of the Department to receive evidence in the administrative hearing, but on neither of these issues was *Roth* remotely relevant. Yet the reversal was grounded on *Roth*, and instead of sending the case back for application of the proper standard, the Supreme Court simply reversed, thus ending the litigation and permitting the magazines to be mailed. The most likely explanation is that the Court found for itself that the magazines in question were not "obscene" within the constitutional standard.

[169] Mounce v. United States, 355 U.S. 180 (1957). In *Mounce*, the government made a "confession of error" that the test used by the court of appeals was "materially different" from the *Roth* test. Memorandum for the United States, pp. 6–8. Thereupon the Court "reversed and remanded to the U.S. District Court for consideration in the light of Roth v. United States." Mounce v. United States, *supra* at 180.

[170] "Indeed, Federal officials are clearly in a mood of caution about any censorship on grounds of obscenity. Their one firm conviction is that they are still free to move against 'hard-core' commercial pornography." Lewis, *supra* note 119.

Even the Postmaster General retreated enough to lift his ban on Alberto Moravia's *The Woman of Rome*. ABPC, Censorship Bull., Aug. 1958 p. 5. But he did not, apparently, lift his bans on other major works such as Hemingway's *For Whom the Bell Tolls*. See Paul & Schwartz, *Obscenity in the Mails*, 106 U. PA. L. REV. 214, 224 (1957). Nor did he completely surrender on *Sunshine and Health*. See Sunshine Publishing Co. v. Summerfield, 184 F. Supp. 767 (D.D.C. 1960).

[171] For example, courts consistently ruled that the nudist motion picture "Garden of Eden" was not obscene. Excelsior Pictures Corp. v. City of Chicago, 182 F. Supp. 400 (N.D. Ill. 1960); Commonwealth v. Moniz, 338 Mass. 442, 155 N.E.2d 762 (1959); Excelsior Pictures Corp. v. Regents of the Univ. of N.Y., 3 N.Y.2d 237, 144 N.E.2d 31 (1957). *Cf.* State v. Rothschild, 109 Ohio App. 101, 163 N.E.2d 907 (1958); State v. Morley, 63 N.M. 267, 317 P.2d 317 (1957). See also the following cases holding other material not obscene: United States v. Keller, 259 F.2d 54 (3d Cir. 1958) (malicious personal postcards charging addressee with immoral sexual conduct); Capitol Enterprises, Inc. v. City of Chicago, 260 F.2d 670 (7th Cir. 1958) (motion picture "Mom and Dad"); City of Cincinnati v. Walton, 145 N.E.2d 407 (Cincinnati Munic. Ct. 1957) (nude photographs, nudist and men's magazines, sado-masochistic publications, and enormous cundrum marked "For the self-made man"; only two stories in *Dude* magazine and the sado-masochistic publications ruled obscene); People v. Silberglitt, 15 Misc. 2d 847, 182 N.Y.S.2d 536 (Sup. Ct. 1958) (art model magazines); People v. Brooklyn News Co., 12 Misc. 2d 768, 174 N.Y.S.2d 813 (Kings County Ct. 1958) (*Gent* magazine).

Only a few courts appear to have given the *Roth-Alberts* standard a broad reading. City of Aurora v. Warner Bros. Pictures Dist. Corp., 16 Ill. App. 273, 147 N.E.2d 694 (1958) (motion picture "Baby Doll" prima facie obscene); People v. Richmond County News, Inc., 13 Misc. 2d 1068, 179 officials also became slightly more cautious in selecting the materials they sought to suppress.[172]

With the tightening of the limitations upon the types of material constitutionally subject to censorship came some criticism, accompanied by proposals designed to evade the impact of the Supreme Court's decisions.[173] Of these, the Post Office Department's program, supported in part by the Department of Justice, was the most elaborate.

In Los Angeles, New York, and perhaps also Chicago, the Post Office and Justice Departments had difficulty convicting persons for mailing obscene matter; courts and juries there were too sophisticated, their attitudes too liberal.[174] Balked by *United States v. Ross*[175] in their efforts to prosecute mailers at the place of receipt of the mail, the two departments supported the enactment of legislation authorizing prosecution of a mailer at any place through which the mail passed, as well as at the place of receipt of the mail.[176] It would be easier to obtain convictions and

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N.Y.S.2d 76 (Ct. Spec. Sess. 1958) (men's magazine, unidentified); Zenith Int'l Film Corp. v. City of Chicago, 183 F. Supp. 623 (N.D. Ill. 1960) (motion picture "The Lovers").

[172] In San Francisco, California, when a municipal court ruled that Allen Ginsberg's *Howl and Other Poems* was not obscene, the president of the police commission declared, "Henceforth we are going to make a distinction and use our heads before proceeding with precipitate arrests." ABPC, Censorship Bull., Nov. 1957, p. 1.

Not all local officials saw the light. The Kansas Board of Review, for example, recently denied a license to the motion picture "Garden of Eden." Censorship Scoreboard, Jan. 1960, p. 8. See note 171 *supra.*

[173] Congressman John Dowdy (D. Tex.), dissatisfied with the Supreme Court's decisions, introduced an amendment to 62 Stat. 768 (1948), 18 U.S.C. § 1461 (1958), to prohibit the mailing of material "which, in the opinion of the normal, reasonable, and prudent individual, would suggest, induce, arouse, incite, or cause, directly or indirectly . . . lewd, libidinous, lustful, indecent, obscene, immoral, or depraved thoughts, desires, or acts on the part of any person . . . ." *Hearings, supra* note 38, at 3–4, 9–11. Congressman Richard H. Poff (D. Va.) introduced a similar bill. *Id.* at 81–83.

[174]

> Difficulties in prosecuting violators resulting from liberal attitudes of courts and juries—particularly in certain metropolitan areas, notably Los Angeles and New York—have established virtual sanctuaries allowing dealers in publications devoted exclusively to distorted sex to operate in defiance of the Post Office Department's best efforts to bar their use of the mails or bring them to justice.

Report on Obscene Matter Sent Through the Mail to the House Committee on Post Office and Civil Service by the Subcommittee on Postal Operations, 86th Cong., 1st Sess. 7 (1959). See also ACLU, Civil Liberties, May 1958, p. 2; *Hearings, supra* note 38, at 8, 14; Paul & Schwartz, *supra* note 170, at 227.

[175] 205 F.2d 619 (10th Cir. 1953). This case held that, under 62 Stat. 768 (1948), 18 U.S.C. § 1461 (1958), a mailer could be prosecuted only at the place of mailing.

[176] *Hearings, supra* note 38, at 31–32; S. REP. No. 1839, 85th Cong. 2d Sess. 5–6 (1958).

heavier sentences in the hinterlands than in Los Angeles or New York—the two principal cities in which mail order operators conduct their businesses.[177] Besides, prosecution of an accused at a place far from his home and place of business would make it inconvenient for him to defend himself.[178] The Congress enacted the forum-shopping measure,[179] and the Postmaster General was encouraged by its results.[180]

Though encouraged, the Post Office was still not satisfied. It found United States attorneys and the Department of Justice reluctant to institute criminal prosecutions on materials that fell short of hard-core pornography, leaving the Post Office to administrative exclusion and impounding-mail proceedings[181] in its efforts to censor "borderline" material.[182] But the administrative proceedings, particularly those for impounding mail addressed to persons suspected of using the mails to distribute obscene matter, proved disappointing. The statute authorizing the impounding-mail proceedings[183] limited the duration of interim impounding orders to 20 days, but the Post Office found it impossible to conclude a hearing on the merits in that space of time.[184] And the Post Office complained that courts had the annoying habit of disagreeing with it on the obscenity of materials it wanted to censor as obscene.[185]

So the Post Office came forward with proposals to extend the duration of interim impounding orders from 20 to 45 days[186] and to insulate postal determinations of obscenity from effective judicial review.[187] The House of Representatives bought the postal proposals,[188] but the Senate did not;[189] both houses, however, finally agreed upon a measure substituting a judicial temporary restraining order and preliminary injunction for the administrative interim impounding orders.[190]

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[177] *Hearings, supra* note 38, at 8.

[178]

> Those who are the subject of prosecution here [Los Angeles], because they place the material in the mails here, who were indicted back, I believe it occurred in the State of Michigan back East, because there were individuals that received the materials there. *I have deferred any action on my part here. The principals, of course, are from this area, their attorneys are from this area. . . . [I]t may be a great deal more inconvenience* [*sic*] *for the defendants to go back to Michigan to defend themselves, which I think is true, which I think is just real fine. We think it is excellent.*

Statement of Laughlin E. Waters, U.S. Attorney, Southern District of California, *Hearings, supra* note 20, at 126. (Emphasis added.) See also Toscano v. Olesen, 184 F. Supp. 296 (S.D. Cal. 1960); United States v. Frew, 187 F. Supp. 500 (E.D. Mich. 1960).

[179] 72 Stat. 940 (1958), 39 U.S.C. § 259(c) (1958).

[180] See *Hearings, supra* note 20, at 9.

[181] An "exclusion" order is one that denies the use of the mails to material non-mailable under 62 Stat. 768 (1948), 18 U.S.C. § 1461 (1958). See Monart, Inc. v. Christenberry, 168 F. Supp. 654 (S.D.N.Y. 1958); Zuckman, *Obscenity in the Mails*, 33 So. Cal. L. Rev. 171 (1960); 27 U. Chi. L. Rev. 354 (1960).

An "impounding-mail" order is one that denies delivery of mail addressed to persons using the mails to defraud or to mail obscene matter. See 28 Geo. Wash. L. Rev. 454 (1960).

[182] *Hearings, supra* note 20, at 70–75.

[183] 70 Stat. 699 (1956), 39 U.S.C. § 259(b) (1958).

[184] *Hearings, supra* note 20 at 76–77, 83.

[185] *Id.* at 84, 112–14.

The postal program for circumvention of the *Roth-Alberts* standards for obscenity may have been the most elaborate, but it was far from the most subtle. For Michigan cleverly sought to minimize the effect of the standards by enacting as its test for obscenity the exact words of the trial court's instructions to the jury in the *Roth* case,[191] which Mr. Justice Brennan's opinion in that case appears, on casual reading, to approve as satisfying constitutional requirements.[192]

These, however, were light and very polite skirmishes. It was not until the United States Supreme Court explicitly addressed itself to the problem of what has been called "ideological obscenity"[193] that some of the proponents of censorship began to fulminate not only against the emerging constitutional standards governing obscenity censorship but against the Supreme Court itself.

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[186] *Id.* at 3, 21–22, 76–77.

[187] The postal proposals, to escape effective judicial review, took two forms: one dealt with judicial review of interim impounding orders, the other with review of the Postmaster General's final orders in exclusion proceedings as well as in impounding-mail proceedings.

The statute authorizes the Postmaster General to issue interim impounding orders when "reasonable and necessary to the effective enforcement" of the statute. 70 Stat. 699 (1956), 39 U.S.C. § 259(b) (1958). The Post Office Department wanted to change this standard to "in the public interest." *Hearings, supra* note 20, at 21, 78–87, 109–10, 114. It also wanted to restrict the federal district courts' power to enjoin enforcement of interim orders to instances in which the issuance of the orders was "arbitrary or capricious." *Id.* at 22, 86, 88, 106–07, 110–11.

In addition, the Post Office wanted to shift judicial review of the Postmaster General's final orders from the federal district courts to the courts of appeal, making the "finding of the Postmaster General as to the facts . . . conclusive if supported by substantial evidence in the administrative record." *Id.* at 22–23, 88, 112–14. The federal district courts had been too prone to make a de novo review of the Postmaster General's orders, and the Post Office didn't want that, even on the central issue of the obscenity of the material involved. *Ibid.*

See pp. 114–20 *infra* for a discussion of the scope of judicial review in obscenity cases.

[188] *Hearings, supra* note 20, at 21–23; *Report, supra* note 174, at 20.

[189] 17 CONG. Q. 21 (Sp. Supp. Sept. 18, 1959).

[190] 74 Stat. 553 (1960). The Senate also unanimously passed a bill to create a federal commission on "noxious and obscene" literature. ACLU, Legislative Bull. (Aug. 1960).

[191] See MICH. STAT. ANN. § 28.575(2) (Supp. 1959). See also notes 84–85 *supra. Cf.* Congressman Dowdy's bill, *supra* note 173.

[192] See Roth v. United States, 354 U.S. 476, 479 (1957). For a discussion of Mr. Justice Brennan's opinion on this point see text accompanying notes 301–10 *infra.*

[193] See Lockhart & McClure, *supra* note 1, at 333–34, 374–76.

D. The Kingsley Pictures Case

Although the United States Supreme Court had already given some indication of its attitude toward ideological obscenity,[194] it did not explicitly dispose of that issue until *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.* decided in June, 1959.[195]

Kingsley Pictures imported the French motion picture *Lady Chatterley's Lover,* based upon the bowdlerized version of D. H. Lawrence's novel,[196] and applied to the Motion Picture Division of the New York State Education Department for a license to exhibit the film.[197] The division found three scenes "immoral" and directed that they be cut before public showing.[198] On appeal, the Regents of the University of the State of New York affirmed the division's action on two grounds: (1) the three scenes ordered deleted were immoral, and (2) "the whole theme of this motion picture is immoral . . . for that theme is the presentation of adultery as a desirable, acceptable and proper pattern of behavior."[199]

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[194] Particularly by the per curiam decision in the *One, Inc.* case. See notes 165 & 168 *supra.*

[195] 360 U.S. 684 (1959). See Kalven, *supra* note 5, at 28–34; 44 Minn. L. Rev. 334 (1960).

[196] Record, pp. 2, 17–19, Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959).

[197] *Id.* at 2, 6, 12 & 19.

[198] The division's order was:

> Reel 2D:
>
> Eliminate all views of Mellors and Lady Chatterley in cabin from point where they are seen lying on cot together, in a state of undress, to end of sequence.
>
> Reel 3D:
>
> Eliminate all views of Mellors caressing Lady Chatterley's buttock and all views of him unzipping her dress and caressing her bare back. Eliminate following spoken dialogue accompanying these actions:
>
> | | |
> |---|---|
> | "Mais tu es nue . . . | "But you're nude . . . |
> | Tu es nue sous ta robe, et tu | You're nude under your dress, |
> | ne le disais pas . . . Qu'est— | and you didn't say so . . . |
> | ce que tu as?" | What is it?" |
>
> Eliminate accompanying English superimposed titles:
>
> "You have nothing on . . . "
> "And you didn't, say so . . . "
> "What is it?"
>
> Reel 4D:
>
> Eliminate entire sequence in Mellors' bedroom, showing Lady Chatterley and Mellors in bed, in a state of undress.

Id. at 10–11.

[199] *Id.* at 16, 21. The regent's committee also said:

> We rest our determination upon the fundamental recognition by our society that adultery is condemned by God-given law (Sixth Commandment given to Moses on Mount Sinai) and man-made law (sections 100–103 of the Penal Law).

The regents' decision was based upon a statute defining an "immoral" motion picture as a film all or part of which "portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior."[200]

In the New York courts, the Appellate Division annulled the regents' determination and, in a clear and concise opinion, ruled that the statutory standard applied by the regents was "not a permissible standard under the United States Constitution for prior restraint."[201] Only obscenity as "narrowly defined in modern judicial decisions," it said, could justify censorship of motion pictures; and by that standard it ruled that the movie Lady Chatterley's Lover was not obscene.[202] The New York Court of Appeals, however, reversed the Appellate Division and reinstated the regents' determination.[203] In doing so, the Court of Appeals subtly recast the central issue. The regents, the court said, denied a license to *Lady Chatterley's Lover* because the statute required the denial of a license to "motion pictures which are immoral in that they *portray* 'acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior.' "[204] Then, ruling that the state may refuse to license a motion picture that "alluringly portrays adultery as proper behavior"[205] even though it is not obscene,[206] the court found that the film did exactly that.[207]

On appeal to the United States Supreme Court, Kingsley raised

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> In line after line and in sequence after sequence, this motion picture glorifies adultery and presents the same as desirable, as acceptable and as proper. We can not put our seal of approval upon such a motion picture . . . .

Id. at 16.

[200] N.Y. Educ. Law, § 122–a (1954).

[201] Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 4 App. Div. 2d 348, 350, 165 N.Y.S.2d 681, 683 (1957).

[202] *Ibid.*

[203] Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 4 N.Y.2d 349, 151 N.E.2d 197 (1958).

[204] *Id.* at 351, 151 N.E.2d at 197.

[205] *Id.* at 358, 151 N.E.2d at 201.

[206] *Id.* at 361, 151 N.E.2d at 203.

[207] "The dominant theme of the film may be summed up in a few words—exaltation of illicit sexual love in derogation of the restraints of marriage. . . . And this entire theme was woven about scenes which unmistakably suggested and showed acts of sexual immorality." *Id.* at 354, 151 N.E.2d at 199. "Thus, this film unquestionably presents adultery as a proper pattern of behavior. And it does so employing several scenes of obscenity." *Ibid.* "We reiterate that this case involves the espousal of sexually immoral acts (here adultery) *plus* actual scenes of a suggestive and obscene nature." *Id.* at 356, 151 N.E.2d at 200.

Though he doubted the validity of the New York statute, Judge Desmond concurred in result, because he wanted the United States Supreme Court to pass upon that question. Judges Dye, Fuld, and Van Voorhis dissented. *Id.* at 370–75, 151 N.E.2d at 209–12.

four issues. In addition to the prior restraint and vagueness issues, Kingsley contended that the New York statute on its face and in its application to *Lady Chatterley's Lover* violated the freedom of expression guarantees of the United States Constitution.[208] Unanimously, but in no less than six opinions, the Court reversed the New York Court of Appeals.[209]

Without considering whether *Lady Chatterley's Lover* was in fact obscene,[210] the Court's majority[211] held part of the statute unconstitutional because, as interpreted by the New York Court of Appeals,[212] it violated the "First Amendment's basic guarantee . . . of freedom to advocate ideas. . . . [and] thus struck at the very heart of constitutionally protected liberty."[213] Justices Black and Douglas, concurring in the majority opinion, wanted to add prior restraint as an additional ground for invalidating the statute,[214] while Mr. Justice Clark, who concurred in result only, thought the statute too vague to meet the requirements of due process.[215]

Three of the Justices,[216] taking a different approach, wanted to dispose of the case on more limited and less abstract grounds. They agreed with the general proposition that "abstract . . . discussion or advocacy of adultery, unaccompanied by obscene portrayal or actual incitement . . . *may not constitutionally* be proscribed,"[217] but took issue with the majority's interpretation of the court of appeals' construction of the New York statute. The court of appeals, the three Justices said, construed the statute narrowly "to require obscenity or incitement, not just mere abstract expressions of opinion."[218] So construed, the New York statute was, they thought, clearly constitutional.[219] They voted to reverse the Court of Appeals because it exceeded constitutional limits in applying the statute to *Lady Chatterley's Lover,* a motion picture "lacking in anything that could properly be termed obscene or corruptive of the public morals by inciting the commission of adultery."[220] But the three Justices gave no explanation for their conclusion that the film was not obscene; they only emphasized the necessity for "considering the particularities of individual cases in this difficult field."[221]

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[208] Jurisdictional Statement, pp. 3–4, Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959).

[209] For detailed analysis of the opinions, see 44 MINN. L. REV. 334 (1960).

[210] The majority found it unnecessary to take up that issue because "the [New York] Court of Appeals unanimously and explicitly rejected any notion that the film is obscene." Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 686 (1959).

[211] Mr. Justice Stewart wrote the majority opinion. He was joined by Mr. Chief Justice Warren and Justices Black, Brennan and Douglas.

[212] The majority's interpretation of the New York Court of Appeals' construction was:

> that the relevant portion of the New York Education Law requires the denial of a license to any motion picture which *approvingly* portrays an adulterous relationship *quite without reference to the manner of its portrayal.*

Id. at 688. (Emphasis added.) Compare text accompanying notes 204 & 205 *supra.*

[213] 360 U.S. at 688.

[214] *Id.* at 690 & 697.

[215] *Id.* at 699.

[216] Mr. Justice Harlan, joined by Justices Frankfurter and Whittaker, wrote the separate concurring opinion here considered. *Id.* at 702–08.

[217] *Id.* at 705.

Now the fat was in the fire, and the relatively mild criticism of the developing constitutional standards governing obscenity censorship and the rather sophisticated efforts to evade them[222] turned into fulminations against the courts, including the United States Supreme Court, and a frontal attack on the standards themselves. To the proponents of censorship the Court's decision was particularly shocking because it gave constitutional protection to ideological obscenity—the advocacy of what they considered to be immoral ideas.[223]

The United States Supreme Court, declared Congressman Clare E. Hoffman (R., Mich.), had "endorsed adultery."[224] The *American Mercury* published articles charging that these developments in constitutional law were the result of a gigantic anti-Christian conspiracy, Jewish and Communist inspired.[225] And in

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[218] *Id.* at 707. They emphasized Chief Judge Conway's statement reiterating "that this case involves the espousal of sexually immoral acts (here adultery) *plus* actual scenes of a suggestive and obscene nature." *Id.* at 706. See also note 207 and text accompanying note 205 *supra.*

[219] 360 U.S. at 702 & 707.

[220] *Id.* at 708.

[221] *Ibid.* Mr. Justice Frankfurter made much of the same point in his separate concurring opinion. *Id.* at 696–97.

[222] See text accompanying notes 173–192 *supra.*

[223] The director of the New York Motion Pictures Division, Louis M. Pesce, observed:

> Certainly some segments of the community are very upset by the "Lady Chatterley" decision—not so much on the erotic aspects but on the advocacy of what they consider an immoral idea.

N.Y. Herald Tribune, July 29, 1959, p. 1, col. 5. Mr. Pesce also reported that the Motion Picture Division had liberalized its policies on nudity and illicit love scenes as a result of the decision; as an illustration of the liberalized policies, he disclosed that the division had restored a scene in the Brigitte Bardot film "Love Is My Profession" "depicting Miss Bardot, her back to the camera, nude, walking from a shower to a living room." *Ibid.*

[224] N.Y. Times, Sept. 2, 1959, p. 31, col. 8.

[225] Benedict, *The "Lady Chatterley's Lover" Case,* 90 American Mercury, Jan. 1960, p. 3; Benedict, *Pornography, a Political Weapon,* 90 American Mercury, Feb. 1960, p. 3.

The House Subcommittee on Postal Operations, headed by Congresswoman Kathryn E. Granahan (D. Pa.), did not go quite so far; it reported that—"The committee does not believe it unreasonable to suspect that there the United States Senate, Senator James O. Eastland (D., Miss.) introduced a constitutional amendment that would forbid abridgment of the "right of each State to decide on the basis of its own public policy questions of decency and morality, and to enact legislation with respect thereto. . . ."[226]

But the disappointed proponents of censorship soon suffered an even crueler blow. For in *Smith v. California*,[227] its next decision, the United States Supreme Court added a requirement of *scienter* for criminal prosecutions to the battery of constitutional requirements the Court had already established, and thus seemed to jeopardize the widespread use of abrupt criminal prosecutions as a means of suppressing materials thought to be objectionable.[228]

E. The Smith Case

Eleazar Smith operated a retail book and magazine store in Los Angeles. He had at least several thousand new and used books in stock, most of them purchased from dealers and publishers in New York City in reliance upon advertising circulars and publishers' catalogues.[229] Among the books he had in stock was one entitled *Sweeter Than Life* by Mark Tryon, the pseudonym for a hack, and published by an obscure publisher known as the "Vixen Press."[230] A Los Angeles police officer bought some magazines and a copy of the book from a clerk in Smith's store and then promptly arrested the clerk.[231] Smith himself was charged with numerous vio-

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is a connection between pornographic literature and subversive elements in this country." *Report, supra* note 174, at 14.

[226] *Hearings, supra* note 20, at 1; 86 Catholic Universe Bull., Jan. 22, 1960, p. 1, col. 7.

In a letter supporting the Eastland Amendment, Senator Herman E. Talmadge (D. Ga.) spoke of "the shocking and unconscionable decision of the Supreme Court of the United States in the [Kingsley Pictures] case . . . ." "By that edict," he said, "that Court, which already has set itself above the laws of man, undertook also to set itself above the laws of God." Then, noting that the "Supreme Court is notorious for its ultraliberal rulings," he declared, "But, one or two more like this latest in the ultra for freedom and only Congress can save us. If Congress can't, then there must be amendments to the Constitution. We must save ourselves." *Hearings, supra* note 20, at 57.

[227] 361 U.S. 147 (1959). See Kalven, *supra* note 5, at 35–40.

[228] See text accompanying notes 23–36 *supra*.

[229] Jurisdictional Statement, pp. 8–9, Smith v. California, 361 U.S. 147 (1959); Brief for Appellant, pp. 6–7.

Unfortunately, we have not yet been able to gain access to the transcript of the Record of this case. Our reconstruction of the case is necessarily based upon the Jurisdiction Statement and the briefs of the parties, which have been made available to us.

[230] 23 Library of Congress, National Union Catalog 1953–1957, 586 (1958). The catalog also lists for the same pseudonym and publisher and for the same year—1954—the following titles: *The Fire That Burns, The Sinning Lens, Stage Struck* and *Take It Off!* "Mark Tryon" does not appear in the catalog for any earlier or later year.

[231] Jurisdictional Statement, p. 8; Brief for Appellant, p. 6.

lations of a Los Angeles ordinance making it "unlawful for any person to have in his possession any obscene or indecent . . . book . . . in any place of business where . . . books . . . are sold or kept for sale. . . ."[232]

In the course of the trial Smith testified that he had not read *Sweeter Than Life*, that indeed he had not read any book for some time since it took him about three months to read one.[233] And although he also testified that he had no reason to believe that the book contained any objectionable material,[234] he confirmed his clerk's testimony[235] that he had instructed the clerk not to permit any one under 21 years of age to handle any books or art magazines.[236]

Also at the trial, Smith proffered the testimony of two expert witnesses, one a clinical psychologist, the other a literary critic.[237] From the literary critic, Smith sought to elicit testimony that the book *Sweeter Than Life* fell within commonly accepted community literary standards, that it had literary merit and served a useful social purpose, that many "best sellers" were comparable in their depiction of lesbianism and other sexual activities, and that the book would not appeal to the prurient interest of the average person.[238] From the psychologist, Smith sought to establish that the book did not go beyond "present day community standards regarding sexual behavior and expression" and that "within the bounds of reasonable psychological certainty" the book would not corrupt and deprave its readers by arousing lascivious thoughts or lustful desires.[239] The trial court excluded the testimony of both witnesses,[240] found Smith guilty, and sentenced him to 30 days in jail.[241] The Appellate Department of the Superior Court affirmed the judgment.[242]

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[232] Jurisdictional Statement, pp. 2–3. The ordinance was LOS ANGELES, CALIFORNIA, MUNICIPAL CODE, § 41.01.1. See Jurisdictional Statement, pp. 14–15, for the full text of the ordinance.

[233] Jurisdictional Statement, p. 9; Brief for Appellant, p. 7.

[234] *Ibid.*

[235] Motion to Affirm the Judgment and/or Dismiss This Appeal, p. 6.

[236] Brief for Appellant, p. 7. In his Appellant's Brief in Opposition to Motion to Dismiss and/or Affirm, Smith resisted the state's attempt to impute "some knowledge" to him from the instructions to his clerk. Smith said:

> [T]he entire testimony of the clerk . . . made it clear that as a matter of business policy, appellant had directed that no one under 21 years of age was to be permitted to handle any magazine or book in the store. To infer knowledge of the contents or the character of any particular book from such circumstances would be clearly unreasonable. In any event the court below disposed of this issue by holding that under the ordinance knowledge and intent were not ingredients of the offense, nor matters of defense . . . .

Appellant's Brief in Opposition to Motion to Dismiss and/or Affirm, p. 5 n.3. The referent of "the court below" in this quotation is the appellate department of the superior court, not the trial court.

One newspaper account of the case reports that the book *Sweeter Than Life* was on a table with a sign saying "only persons 21 years of age and over may handle books on this table" and that the trial court "held that the sign was evidence that Smith was aware of the contents of the book." 86 Catholic Universe Bull., Jan. 15, 1960, p. 4, col. 7.

[237] Jurisdictional Statement, p. 27; Brief for Appellant, p. 65.

[238] Jurisdictional Statement, pp. 27–28; Brief for Appellant, pp. 65–66.

On appeal to the United States Supreme Court, Smith raised four prolix issues, all of them complaining of violations of freedom of speech and press, due process, and equal protection.[243] Boiled down, they amounted to contentions that (1) the ordinance was unconstitutional because it did not require proof of scienter,[244] (2) constitutionally relevant evidence had been excluded,[245] (3) unconstitutional standards had been applied to the book,[246] and

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[239] Jurisdictional Statement, pp. 28–29; Brief for Appellant, pp. 66–67.

Smith did not, as indeed he could not, strongly press the literary merit of *Sweeter Than Life* in the United States Supreme Court; indeed he came close to conceding that the hack-written novel was hackneyed and that its writing was unpolished. Brief for Appellant, p. 62. So did the Brief for the American Civil Liberties Union as Amicus Curiae, p. 9.

[240] Jurisdictional Statement, pp. 9 & 29; Brief for Appellant, pp. 7 & 67.

[241] Brief for Appellant, p. 2.

All other charges against Smith were dismissed. *Ibid.* These, apparently, mainly involved the possession of the magazines the police officer bought in Smith's store. See note 229 *supra.*

[242] People v. Smith, 161 Cal. App. 2d 860, 327 P.2d 636 (1958).

In its opinion the appellate court ruled, *inter alia,* that the book was obscene considered as a whole, but with "obvious common-sense limits to the 'over all' view." *Id.* at 863, 327 P.2d at 638. It ruled that the ordinance did not require scienter, that "a book seller may be constitutionally prohibited from possessing or keeping an obscene book in his store and convicted of doing so even though it is not shown he knows its obscene character, nor that he intends its sale." *Id.* at 866, 327 P.2d at 640. The court also saw no error in the trial court's exclusion of the expert testimony. *Id.* at 863, 327 P.2d at 638.

[243] Jurisdictional Statement, pp. 6–8, Smith v. California, 361 U.S. 147 (1959); Brief for Appellant, pp. 4–6.

The state rephrased the issues much more concisely. See Brief for Appellee, p. 2.

[244] The ordinance, Smith contended, imposed—

> absolute strict criminal liability for the mere possession of an "obscene" book in a place of business where books are sold or kept for sale, without requirement of proof of the defendant's knowledge of the contents or character of the book or intent to sell, and without regard to proof by defendant of the absence of such knowledge and intent.

Brief for Appellant, p. 4.

[245] Here, Smith complained that the courts below had held that—

> no evidence was admissible . . . to show the artistic, literary, scientific and educational merits of the book . . . to show what the predominant appeal of the book would be to the average person and the effect on his behavior; to show the degree of public acceptance of the material contained in the book; and to show the absence of appeal to prurient interest.

Id. at 5.

[246] The unconstitutional standards, Smith said, were "the unconstitutionally restrictive (*Hicklin* (L.R. 3 Q.B. 360) and *Besig,* 208 F.2d 142 (C.A. 9, 1953)) standards for judging the obscenity of a book, to wit, the effect of isolated excerpts upon particularly susceptible persons . . . ." *Ibid.*

(4) the book was not obscene.[247] The Court unanimously[248] reversed the judgment of the California Court, but the Justices could not all agree on the ground for reversal.

The majority seized upon only the first issue[249] and, without considering the particular application of the ordinance to Smith,[250] held that the ordinance on its face violated the freedom of expression guarantees of the federal constitution because it eliminated all mental elements from the crime and thus tended seriously to restrict the dissemination of books that are not obscene.[251] Mr. Justice Brennan, speaking for the majority,[252] said:

> By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally-protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.[253]

Although the majority held that scienter in some degree is constitutionally required, it explicitly declined to pass upon "what sort of mental element is requisite to a constitutionally permissible prosecution."[254]

Despite his usual reluctance to reach unnecessary constitutional issues, Mr. Justice Frankfurter, in a separate concurring opinion, protested the majority's failure to give "some indication of the scope and quality of scienter that is required."[255] He did not dispute the constitutional necessity for some degree of scienter, but wanted the Court to make it clear that the "decision, in its practical effect, is not intended to nullify the conceded power of the State to prohibit booksellers from trafficking in obscene literature."[256] He also wanted to reverse the judgment for an additional reason—the exclusion of expert testimony "regarding the prevailing literary and moral community standards . . . . [and] the psychological or physiological consequences of questioned literature. . . ."[257] Mr. Justice Harlan wanted to reverse the judgment and remand the case for a new trial solely because all evidence bearing upon contemporary community standards, not merely expert testimony, had been excluded;[258] he was dubious about imposing any scienter requirement.[259]

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[247] *Id.* at 4.

[248] All but one Justice voted for flat reversal of the judgment; Mr. Justice Harlan wanted to reverse the judgment and remand the case for a new trial. Smith v. California, 361 U.S. 147, 169 (1959).

[249] The majority explicitly disclaimed passing upon the other issues and assumed without deciding that the book was correctly adjudged obscene. *Id.* at 149 n.4.

[250] *Id.* at 150.

[251] *Id.* at 150–55.

[252] Mr. Justice Brennan was joined by Mr. Chief Justice Warren and Justices Clark, Stewart, and Whittaker.

[253] *Id.* at 153.

[254] *Id.* at 154. This is considered at pp. 103–08 *infra.*

[255] *Id.* at 162.

[256] *Ibid.*

Justices Black and Douglas, concurring in separate opinions, reaffirmed their conviction that all publications—even obscene ones—are entitled to constitutional protection.[260] Mr. Justice Douglas, however, approved the majority's requirement of scienter, for he could "see no harm, and perhaps some good," in the requirement.[261]

Hostile reactions to the Court's decision were not long in coming. Mr. Justice Brennan's reasoning, said one commentator, was "unrealistic" and "absurd."[262] To another commentator, the decision added a "maddening complication" and a "frustrating element" to the law of obscene literature.[263] And municipal law officers complained that the decision would "cripple municipal efforts to curb obscenity" "[b]ecause of the virtual impossibility of proving scienter."[264] Lower courts, however, seemed to have little difficulty coping with the new requirement.[265]

III. THE DEVELOPING CONSTITUTIONAL STANDARDS

These, then, are the obscenity decisions of the United States Supreme Court in the contexts in which they were decided. In pointing the way to developing constitutional standards, they settle some of the issues inherent in obscenity censorship, give probable direction to the solution of others, leave some relatively obscure and a few untouched.

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[257] *Id.* at 165. See Kohn, *Social Psychological Data, Legislative Fact, and Constitutional Law*, 29 GEO. WASH. L. REV. 136 (1960).

[258] *Id.* at 171–72. Mr. Justice Harlan here referred to Smith's efforts to compare the content of *Sweeter Than Life* with that of other publications widely accepted and openly published, sold, and purchased.

[259] *Id.* at 169–70.

[260] *Id.* at 156, 167–69. Mr. Justice Douglas adhered to the position he advanced in the *Roth* case. See text accompanying note 130 *supra.* Mr. Justice Black appears now to have come to the conclusion that no censorship of obscenity is permissible in any circumstances.

[261] *Id.* at 169.

[262] Richmond News Leader, Dec. 19, 1959, p. 10, col. 1.

[263] Breig, *The Court and Smith*, 86 Catholic Universe Bull., Jan. 15, 1960, p. 4, col. 7. Breig also observed: "The present court seems to see in the Constitution a total preoccupation with individual liberty without reference to the common good. This is a mistaken attitude." *Ibid.*

[264] Brief Amici Curiae of the Member Municipalities of the National Institute of Municipal Law Officers in Support of Petition for Rehearing by Appellee, p. 2. See also 86 Catholic Universe Bull., Jan. 15, 1960, p. 2 col. 2, for the comments of Cleveland's law director.

[265] See, *e.g.*, People v. Schenkman, 20 Misc. 2d 1093, 195 N.Y.S.2d 570 (Ct. Spec. Sess. 1960). *Cf.* State v. Miller, 112 S.E.2d 472 (W. Va. 1960). See also Comment, 38 N.C.L. REV. 634 (1960).

We know, for example, that material considered by the Court to be "obscene" does not enjoy constitutional protection,[266] and that the clear and present danger test, commonly applied by the Court in freedom of expression cases, does not apply to "obscene" matter.[267] We know, too, that statutes simply prohibiting the publication of obscenity are not unconstitutional for vagueness and uncertainty,[268] and that the injunctive powers of the courts may be used to prevent further publication of already published "obscene" matter, despite implications of prior restraint, so long as the injunction is based on a fair judicial hearing.[269]

But we also know that the Court gives constitutional protection to non-obscene sexual material and takes a narrow view of what is "obscene."[270] Our uncertainties begin when we examine critically the verbal formula set out by the Court for determining what is "obscene," and they multiply when we leave the realm of abstraction and attempt to separate the obscene from the non-obscene, to determine what types of material in what circumstances are obscene and therefore may be denied constitutional protection.

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[266] See text accompanying notes 123–29 *supra.*

[267] Roth v. United States, 354 U.S. 476, 486–87 (1957). At least one court has recently rejected this position and applied the Black-Douglas minority view. See People v. Douglas, 21 Misc. 2d 551, 202 N.Y.S.2d 160 (St. Lawrence County Ct. 1959).

The clearest and best judicial exposition of the need for applying the clear and present danger test in obscenity cases appears in the dissenting opinion of Justice O'Connell in State v. Jackson, 356 P.2d 495, 508 (Ore. 1960).

[268] See text accompanying note 122 *supra.* We use the term "publication" here in its broadest sense to include sale as well as the narrower technical publication.

Some state courts, however, have imposed more stringent definiteness requirements and ruled typical obscenity laws unconstitutional for vagueness. See State v. Christine, 239 La. 259, 118 So. 2d 403 (1960) (statute prohibiting obscenity and defining "obscenity" as the "performance . . . in any public place . . . of any act of lewdness or indecency, grossly scandalous and tending to debauch the morals and manners of the people"); State v. Nelson, 168 Neb. 394, 95 N.W.2d 678 (1959) (ordinance prohibiting sale of any publication "which, read as a whole, is of an obscene nature"); Commonwealth v. Blumenstein, 396 Pa. 417, 153 A.2d 227 (1959) (statute prohibiting the exhibition of motion pictures of an "obscene . . . nature or character"). The defendant in the Louisiana case was Lilly Christine, alias "Cat Girl," an "exotic" dancer. See 48 Life, No. 13, p. 66, April 4, 1960.

Pennsylvania, in an effort to resurrect its obscenity laws, has enacted, almost verbatim, the definition of obscenity laid down in the *Roth* case. *Compare* PA. STAT. ANN. tit. 18, § 4524 (Supp. 1959), *with* text accompanying note 274 *infra.*

[269] See text accompanying notes 141–47 *supra.*

[270] See text accompanying notes 126–29, 162–69 *supra.*

A. WHAT IS OBSCENE?

1. *The Verbal Formula*

"Obscene material," the Court declared in the *Roth-Alberts* opinion, "is material which deals with sex in a manner appealing to prurient interest"[271] and in a footnote to this sentence added, "*I.e.* material having a tendency to excite lustful thoughts."[272] Obscenity is denied constitutional protection because it is "utterly without redeeming social importance."[273] And a constitutionally satisfactory test for obscenity is the test the Court said had been adopted by American courts in relatively recent decisions: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[274]

Already some puzzling questions appear. If, as the Court seems to say, material that *appeals* to prurient interest is material that has a *tendency* to excite lustful thoughts, what degree of causal relationship between the material and the thought is required?[275] Even if "the dominant theme of the material taken as a whole" must have a *tendency* to excite lustful thoughts of "the average person," does it necessarily follow that such material is always "utterly without redeeming social importance"?[276]

Is "the average person" always the proper hypothetical person to whose prurient interest the material must appeal? What of material, prurient to the average person, addressed to an audience of persons to whom the material has no prurient appeal? Or of material without prurient appeal to the average person addressed to an audience of persons to whom it has a high degree of prurient appeal?[277]

What is the "community" whose "contemporary standards" are to be applied in the determination of what is obscene? Is it a community bounded by geographical limits or a community formed along cultural lines? If a geographical community, is it the local community in which the censorship of material for obscenity takes place? And if local, how local—a particular state, or urban, or rural area? Or is it the national community or even the larger international community commonly called the western world?[278] And if it is the community's *contemporary* standards that are to be applied, what is to be done with materials like Jonathan Swift's poems to *Celia*—accepted and widely read in the past—that are likely to be a bit too raw for the contemporary standards of some communities, however defined?[279]

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[271] Roth v. United States, 354 U.S. 476, 487 (1957).

[272] *Id.* at 487 n.20.

[273] *Id.* at 484.

[274] *Id.* at 489.

[275] See Lockhart & McClure, *supra* note 1, at 330–33, for a discussion of the causality problem.

Three of the cases cited by the Court as decisions adopting the constitutionally satisfactory test for obscenity dealt with the causality question. They were: Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945); United States v. Levine, 83 F.2d 156 (2d Cir. 1936); and United States v. Dennett, 39 F.2d 564 (2d Cir. 1930). In the *Levine* case the court said that the degree of likelihood of sexual stimulation as well as the degree of intensity of the resulting sexual thought must outweigh the merits of the material. See United States v. Levine, 83 F.2d 156, 158 (1936).

[276] See pp. 95–99 *infra*, for a discussion of the importance of aesthetic and other social values of material claimed to be obscene.

[277] See Lockhart & McClure, *supra* note 1, at 338–42 & 394–95, and pp. 70–88 *infra*. for consideration of the audience problem.

These are some of the puzzling questions raised by the verbal formula for obscenity set out in the *Roth-Alberts* opinion. But questions even more difficult and fundamental to the basic concept of obscenity are suggested by some of the Court's citations and comments about other tests for obscenity than the formula approved in that opinion.

In the footnote to the sentence setting out the constitutionally satisfactory test for obscenity adopted by American courts[280] the Court cited 13 cases as examples of decisions that had adopted the approved formula.[281] And the cases grouped together in this footnote make strange bedfellows indeed. For in these cases the courts adopted and applied a variety of tests for determining what is obscene, and some even explicitly repudiated tests or factors strongly emphasized by others.[282] In their efforts to define the ob-

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[278] See pp. 108–14 *infra* for a consideration of the geographical community problem. The cultural community question is a part of the larger problem of the specialized audience, discussed at pp. 70–88 *infra*.

[279] See Vizetelly, *Extracts Principally from the English Classics showing that the Legal Suppression of M. Zola's Novels would logically involve the Bowdlerizing of some of the greatest Works in English Literature* (1888), for some of the Swift poems and other similar material.

[280] See text accompanying note 274 *supra*.

[281] See Roth v. United States, 354 U.S. 476, 489 n.26 (1957).

[282] The thirteen cases were: Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945); Parmelee v. United States, 113 F.2d 729 (D.C. Cir. 1940); United States v. Levine, 83 F.2d 156 (2d Cir. 1936); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930); Khan v. Leo Feist, Inc., 70 F. Supp. 450 (S.D.N.Y. 1947), *aff'd*, 165 F.2d 188 (2d Cir. 1947); United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954); Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945); State v. Becker, 364 Mo. 1079, 272 S.W.2d 283 (1954); Adams Theatre Co. v. Keenan, 12 N.J. 267, 96 A.2d 519 (1953); Bantam Books, Inc. v. Melko, 25 N.J. Super. 292, 96 A.2d 47 (Ch. 1953); Commonwealth v. Gordon, 66 Pa. D. & C. 101 (Philadelphia County Ct. 1949), *aff'd sub nom.* Commonwealth v. Feigenbaum, 166 Pa. Super. 120, 70 A.2d 389 (1950); and as a "*cf.*," a portion of Judge Frank's concurring opinion in Roth v. Goldman, 172 F.2d 788, 794–95 (2d Cir. 1949).

For the numerous inconsistencies in the views expressed by the courts in scene, some of these courts spoke of material that suggested or aroused sexual thoughts or desires,[283] others of material that depraved or corrupted by suggesting or inciting such thoughts or desires,[284] and still others of pornography—dirt for dirt's sake, material whose dominant purpose and effect is erotic allurement, a calculated and effective incitement to sexual desire.[285] Beyond these and other inconsistencies in the 13 cases cited, there were some contradictions. For example, *Ulysses* and a number of other cases[286] assigned great importance to the literary and other social values of the material at hand. But in *Commonwealth v. Isenstadt*[287] the court rejected this "pleasing fancy," saying that the purpose of the obscenity law was to protect the public from harm and that most members of the public cared nothing for literary values, and affirmed a book dealer's conviction for handling Lillian Smith's *Strange Fruit* despite its conceded literary merit.[288] And the Missouri court, in *State v. Becker*,[289] repudiated the *Ulysses* line of cases, saying: "The apparent rationale of those . . . cases . . . seems to us to be confounded of confusion and

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most of these cases, see Lockhart & McClure, *supra* note 1, at 327–50. Although the *Khan*, *American Civil Liberties Union*, *Becker*, and *Adams Theatre* cases are not included in that discussion, the differences in points of view of the cases discussed are typical of the inconsistencies among these four cases as well.

[283] See Walker v. Popenoe, 149 F.2d 511, 512 (D.C. Cir. 1945); United States v. Levine, 83 F.2d 156, 158 (2d Cir. 1936); United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 347, 121 N.E.2d 585, 592 (1954). See also Lockhart & McClure, *supra* note 1, at 329–31.

[284] See United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930); Commonwealth v. Isenstadt, 318 Mass. 543, 549–50, 62 N.E.2d 840, 844 (1945); State v. Becker, 364 Mo. 1079, 1083–84, 272 S.W.2d 283, 285 (1954). See also Lockhart & McClure, *supra* note 1, at 332–33.

[285] See Bantam Books v. Melko, 25 N.J. Super. 292, 316, 96 A.2d 47, 59 (Ch. 1953); Commonwealth v. Gordon, 66 Pa. D. & C. 101, 136, 151 (Philadelphia County Ct. 1949), *aff'd sub nom.* Commonwealth v. Feigenbaum, 166 Pa. Super. 120, 70 A.2d 389 (1950). *Cf.* United States v. One Book Called "Ulysses," 5 F. Supp. 182, 183 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

[286] Walker v. Popenoe, 149 F.2d 511, 512 (D.C. Cir. 1945); Parmelee v. United States, 113 F.2d 729, 735–37 (D.C. Cir. 1940); United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930); United States v. One Book Called "Ulysses," 5 F. Supp. 182, 183–84 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705, 708 (2d Cir. 1934); Bantam Books v. Melko, 25 N.J. Super. 292, 304, 314–15, 96 A.2d 47, 53, 58–59 (Ch. 1953).

[287] 318 Mass. 543, 62 N.E.2d 840 (1945).

[288] The Court did not preclude any consideration of literary values; it said that they could be considered in determining whether a book is obscene, but it is clear that the Court thought such values to be relatively unimportant. See Lockhart & McClure, *supra* note 1, at 344–48.

[289] 364 Mo. 1079, 272 S.W.2d 283 (1954).

artificialities, and seems not to have considered certain basic concepts and teachings which we deem important."[290]

We can discern only two common threads running through all 13 cases. In one way or another, every case spoke of judging material as a whole instead of by its parts,[291] or of judging it by its effect upon average persons instead of by its effect upon the weakest and most susceptible,[292] or of both.[293] Yet even this analysis is not free from difficulty. One of the cases twisted the notion that material is to be judged by reference to those it is likely to reach—its probable audience[294]—to make the obscenity of material turn on its effect upon a single individual to whom it is sold rather than upon persons typical of the whole audience.[295] Two cases indicated that evidence of the material's actual audience is inadmissible, at least when offered by the defendant.[296] And two other cases paid lip service at best to the requirement that material must be judged as a whole and by its impact upon average persons.[297]

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[290] 364 Mo. 1079, 1085, 272 S.W.2d 283, 286 (1954).

Still another contradiction appears in the disagreement over the community standard. Judge Bok, in Commonwealth v. Gordon, 66 Pa. D. & C. 101, 136 (Philadelphia County Ct. 1949), *aff'd sub nom.* Commonwealth v. Feigenbaum, 166 Pa. Super. 120, 70 A.2d 389 (1950), stressed the need for a uniform *national* standard. But the courts in Commonwealth v. Isenstadt, 318 Mass. 543, 551, 62 N.E.2d 840, 845 (1945) and Adams Theatre Co. v. Keenan, 12 N.J. 267, 271–72, 96 A.2d 519, 521 (1953), spoke of *local* standards at the time and place of each alleged offense. And the court in Parmelee v. United States, 113 F.2d 729, 731–32 (D.C. Cir. 1940), spoke of "present critical point in the compromise between candor and shame at which the community may have arrived here and now," but gave no indication of the nature or scope of the "community" it meant. See also Roth v. Goldman, 172 F.2d 788, 795 (2d Cir. 1949). For consideration of the community standard problem, see pp. 108–14 *infra.*

[291] See Khan v. Leo Feist, Inc. 70 F. Supp. 450, 458 (S.D.N.Y. 1947), *aff'd,* 165 F.2d 188 (2d Cir. 1947); Adams Theatre Co. v. Keenan, 12 N.J. 267, 272, 96 A.2d 519, 521 (1953) ("dominant effect").

[292] See Roth v. Goldman, 172 F.2d 788, 794–95 (2d Cir. 1949) (Frank, J., concurring).

[293] See Walker v. Popenoe, 149 F.2d 511, 512 (D.C. Cir. 1945); Parmelee v. United States, 113 F.2d 729, 731 (D.C. Cir. 1940); United States v. Levine, 83 F.2d 156, 157–58 (2d Cir. 1936); United States v. Dennett, 39 F.2d 564, 568–69 (2d Cir. 1930); United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184–85 (S.D.N.Y. 1933), *aff'd,* 72 F.2d 705, 707 (2d Cir. 1934); American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 344, 121 N.E.2d 585, 591 (1954); Commonwealth v. Isenstadt, 318 Mass. 543, 551–54, 62 N.E.2d 840, 845–46 (1945); State v. Becker, 364 Mo. 1079, 1084, 272 S.W.2d 283, 285 (1954); Bantam Books, Inc. v. Melko, 25 N.J. Super. 292, 314–15, 96 A.2d 47, 58 (Ch. 1953); Commonwealth v. Gordon, 66 Pa. D. & C. 101, 123, 125, 131, 134–35 (Philadelphia County Ct. 1949), *aff'd sub nom.* Commonwealth v. Feigenbaum, 166 Pa. Super. 120, 70 A.2d 389 (1950).

[294] See pp. 70–88 *infra.* See also Lockhart & McClure, *supra* note 1, at 338–42, for a discussion of the probable audience concept.

[295] United States v. Levine, 83 F.2d 156, 158 (2d Cir. 1936).

[296] United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930); United States v. Levine, *supra* note 295, at 158.

Nevertheless, we conclude that the Court in the *Roth-Alberts* opinion laid down two—and only two—constitutional requirements for determining what is obscene. The two requirements are, of course, that material must be judged as a whole, not by its parts, and that it must be judged by its impact on average persons, not the weak and susceptible.[298] Our conclusion is supported by the context in which the Court was speaking when it set out a constitutionally satisfactory test for obscenity.[299] For the Court was here concentrating its fire on the two most criticized aspects of the old *Hicklin* rule as interpreted by some American courts: the judging of material by isolated passages and by their effect on particularly susceptible persons.[300] To satisfy constitutional requirements, therefore, any test for obscenity must not include these two objectionable elements.

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[297] In State v. Becker, 364 Mo. 1079, 272 S.W.2d 283 (1954), the court, after speaking of "the effect of these publications [nudist magazines] in their entirety upon persons of average human instincts," went on to say that it could "not disregard an unambiguous enactment which has as its obvious purpose the protection of the morals of the *susceptible* into whose hands these publications may come." *Id.* at 1084, 272 S.W.2d at 286. (Emphasis added.) The court also approved the old *Hicklin* test for obscenity. *Id.* at 1084, 272 S.W.2d at 285.

Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945), virtually emasculated the "wholly obscene" standard; it tested the relevancy of the objectionable passages by deciding whether the passages were *necessary* to convey the "sincere message of the book." *Id.* at 557, 62 N.E.2d at 847. The court in this case also greatly restricted the "average person" standard; it included adolescents as an important part of the reading public because "many adolescents are avid readers of novels," and approved a refusal to charge the jury that the book must be judged by its effect upon the "normal youth or adult as compared to the abnormal" because a book that "adversely affects a substantial proportion of its readers may well be found to lower appreciably the average moral tone of the mass." *Id.* at 552, 62 N.E.2d at 845.

[298] For detailed consideration of the "wholly obscene" standard, see pp. 88–95 *infra*. The "average person" standard is considered at pp. 71–73 *infra*.

[299]

> The early leading standard of obscenity allowed material to be judged merely by the *effect of an isolated excerpt upon particularly susceptible persons*. Regina v. Hicklin, [1868] L.R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeal to prurient interest. The *Hicklin* test, *judging obscenity by the effect of isolated passages upon the most susceptible persons*, might well encompass material legitimately treating with sex, and *so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press*. On the other hand, *the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity*.

Roth v. United States, 354 U.S. 476, 488–89 (1957). (Emphasis added.)

[300] See Judge Learned Hand's celebrated attack on the *Hicklin* rule in United States v. Kennerley, 209 Fed. 119, 120–21 (S.D.N.Y. 1913).

We come to the same conclusion about the Court's statements in the *Roth-Alberts* opinion that "both trial courts below sufficiently followed the proper standard," and that "both courts used the proper definition of obscenity."[301] We base our conclusion upon an analysis of the content of the tests as well as upon the context in which the Court stated its approval of these tests.

The tests so approved were not wholly consistent. If, as the Supreme Court assumed, the trial court in *Alberts* applied the obscenity test of *People v. Wepplo,*[302] the test was whether the material had "a substantial tendency to *deprave or corrupt its readers* by inciting lascivious thoughts or arousing lustful desires,"[303] which is susceptible to an interpretation that the material must adversely affect character and behavior.[304] In *Roth,* however, the trial court instructed the jury that the material must have "a tendency to *excite lustful thoughts.*"[305] As with the 13 cases cited by the Court as examples of decisions that had adopted a constitutionally satisfactory test for obscenity,[306] the principal element common to both tests was their requirement that the material be judged as a whole rather than by its parts and, particularly in *Roth,* that it be judged by reference to average persons rather than the weak and susceptible.[307] True, there was another element common to both tests, for both the trial court in *Roth* and the

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[301] 354 U.S. at 489. The trial court's charge to the jury was not technically in issue in the *Roth* case, for this issue was excluded in the grant of certiorari. See note 93 *supra* and text accompanying notes 93–99 *supra.*

[302] 78 Cal. App. 2d 959, 178 P.2d 853 (1947). This was the assumption of the United States Supreme Court. See *Roth v. United States,* 354 U.S. at 486. But it is far from clear that this was actually the case. See note 105 *supra.*

[303] People v. Wepplo, 78 Cal. App. 2d 959, 961, 178 P.2d 853, 855 (1947). (Emphasis added.) See also *Roth v. United States,* 354 U.S. at 486, quoting Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945).

[304] See Lockhart & McClure, *supra* note 1, at 332–33. This is Mr. Justice Harlan's interpretation of the *Wepplo* test. See *Roth v. United States,* 354 U.S. at 498–99 n. 1.

[305] Record, pp. 25–26, Roth v. United States, 354 U.S. 476 (1957). True, the trial court also charged that the material "must be calculated to corrupt and debauch the minds and morals of those into whose hands it may fall" but immediately added that "it must tend to stir sexual impulses and lead to sexually impure thoughts." *Ibid.* But the overall impression of the charge is that the arousal of sexual thoughts alone is enough to make material obscene. This is Mr. Justice Harlan's impression, too. 354 U.S. at 498–99. It is consistent with the verbal formulas for obscenity commonly used by the federal courts. See Lockhart & McClure, *supra* note 1, at 329–30.

[306] See notes 281 & 282 *supra* and accompanying text.

[307] See Record, pp. 25 & 26, Roth v. United States, 354 U.S. 476 (1957); People v. Wepplo, 78 Cal. App. 2d 959, 961–62, 178 P.2d 853, 855 (1947).

California court in *Wepplo* rejected literary merit as a factor of any importance.[308] But it is inconceivable that the Court, which denied constitutional protection to obscenity because it is "utterly without redeeming social importance,"[309] could have endorsed this portion of the tests applied in the two cases.

The context in which the Court stated its approval of the tests applied in the *Roth* and *Alberts* cases also indicates that the Court approved the tests only because they satisfied the requirements that material be judged as a whole and by reference to normal persons. The Court's statement of approval followed the paragraph in which the *Hicklin* rule was discussed and rejected as unconstitutional; in its next sentences—and in the same paragraph in which the statement of approval appeared—the Court emphasized at length that both trial courts had judged the material as a whole and by its effect on normal persons.[310]

In sum, we can find in the *Roth-Alberts* majority opinion only two constitutional requirements. The material must be judged as a whole, not by its parts in isolation, and it must be judged by its impact upon average or normal persons, not the weak and susceptible. We do not mean, of course, that there are no other constitutional requirements—but they are not set out in the *Roth-Alberts* opinion.

Although we have found two major constitutional requirements for censoring obscenity, we are left with the most puzzling question of all about the verbal formula for obscenity approved in the *Roth-Alberts* opinion. What *is* obscenity? What is its essential nature?[311] On this central question the Court said only that "obscene material is material which deals with sex in a manner appealing to prurient interest."[312]

The definition of obscenity as sexual material that appeals to prurient interest, however, merely pushes the central question back a notch. If obscenity is sexual material that appeals to prurient interest, what is the appeal to prurient interest that makes sexual material obscene? What is its essential nature?

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[308] See notes 87 & 105 *supra*. In the *Wepplo* case, the only thing that saved the owner of a bookstore and his sales clerk from an affirmance of their convictions for selling Edmund Wilson's *Memoirs of Hecate County* was the trial court's error in eliminating scienter from the state obscenity law. See People v. Wepplo, 78 Cal. App. 2d 959, 966, 178 P.2d 853, 858 (1947).

[309] Roth v. United States, 354 U.S. at 484. This point the Court emphasized in the following passage: "All *ideas having even the slightest redeeming social importance*—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties . . . ." *Ibid.* (Emphasis added.) The Court also observed that the "portrayal of sex, *e.g.*, in *art, literature* and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Id.* at 487. (Emphasis added.)

[310] *Id.* at 489–90. The Court here seemed to use "average person" and "normal person" interchangeably.

[311] We have already expressed ourselves on the difficulty of this problem. See Lockhart & McClure, *supra* note 1, at 320–24.

[312] 354 U.S. at 487.

The phrase "appeal to prurient interest" is relatively rare in the law of obscenity. Even the word "prurient" is not common and, when used, is usually used to describe a type of abnormal person who is not a suitable hypothetical person for judging the material.[313] In the *Roth-Alberts* opinion the Court borrowed the phrase "appeal to prurient interest" from a tentative draft of the American Law Institute's *Model Penal Code,*[314] which in turn had lifted it from a 1915 opinion of the Supreme Court.[315] But the Court and the American Law Institute did not agree upon the meaning of the phrase.

To the American Law Institute, "prurient interest" is a "shameful or morbid interest in nudity, sex, or excretion;"[316] it is "an exacerbated, morbid, or perverted interest growing out of the conflict between the universal sexual drive of the individual and equally universal social controls of sexual activity."[317] Material "appeals" to this interest when, "of itself," the material has "the capacity to attract individuals eager for a forbidden look behind the curtain of privacy which our customs draw about sexual matters."[318] The Institute's primary purpose in adopting this definition was to prevent exploitation of the psychosexual tension created by the conflict between the individual's normal sexual curiosity and drive, and the powerful social and legal inhibitions that restrain overt sexual behavior.[319]

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[313]

> This earlier doctrine [the *Hicklin* rule] necessarily presupposed that the evil against which the statute [the Comstock law] is directed so much outweighs all interests of art, letters or science that they must yield to the mere possibility that some *prurient person* may get a sensual gratification from reading or seeing what to most people is innocent and may be delightful or entertaining. No civilized community not fanatically puritanical would tolerate such an imposition . . . .

United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936). (Emphasis added.) See also Commonwealth v. Isenstadt, 318 Mass. 543, 551, 62 N.E.2d 840, 845 (1945).

[314] Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957). See Roth v. United States, 354 U.S. at 487 n.20.

[315] See Model Penal Code, Comment, *op. cit. supra* note 314, at 29. The opinion was by Mr. Justice McKenna in Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915). In the opinion he justified the censorship of motion pictures in part because "they take their attraction from the general interest, eager and wholesome it may be, in their subjects, *but a prurient interest may be excited and appealed to.*" *Id.* at 242. (Emphasis added.)

[316] Model Penal Code, *op. cit. supra* note 314, § 207.10(2).

[317] *Id.* at 29.

[318] *Id.* at 10.

[319] *Id.* at 10 & 30.

The prevailing tests for obscenity were rejected by the Institute. It rejected "the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties."[320] It also rejected the test of "tendency to corrupt or deprave" because of the lack of evidence of any connection between obscenity and misbehavior and because of "the wide disparity of strongly held views as to what does tend to produce that result."[321] To the draftsmen of the *Model Penal Code,* "it seemed obvious that inquiry as to the nature of the appeal of a book, i.e., the kind of appetite to which the purveyor is pandering, is quite different from an inquiry as to the *effect* of a book upon the reader's thoughts, desire, or action."[322]

But what seemed obvious to the draftsmen of the *Code* was not obvious to the Court. For after borrowing the phrase "appeal to prurient interest" from the *Model Penal Code,* the Court went on to say that "material which deals with sex in a manner appealing to prurient interest" is "material having a tendency to excite lustful thoughts," and that "we perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code . . . ."[323] At this point the Court referred to one of the pages on which the draftsmen of the *Code* explicitly rejected the prevailing tests for obscenity and attempted to differentiate the test of "appeal to prurient interest."[324] And Mr. Justice Harlan in his separate opinion carefully called attention to this apparent contradiction between the A.L.I.'s explanation of its "prurient interest" test and the Court's interpr[illegible] of it, quoting at length from the same page of the draft[illegible] comments to the *Code.*[325] It seems probable therefore that the Court regarded the distinctions drawn by the *Code's* draftsmen as distinctions without a constitutionally significant difference.[326]

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[320] *Id.* at 10. This was the test applied by the trial court in the *Roth* case. See note 305 *supra* and accompanying text.

[321] MODEL PENAL CODE, *op. cit. supra* note 314, at 21–22. This was the test stated in the *Wepplo* case. See text accompanying notes 303 & 304 *supra.*

[322] Schwartz, *Criminal Obscenity Law: Portents from Recent Supreme Court Decisions and Proposals of the American Law Institute in the Model Penal Code,* 29 Pa. Bar Ass'n. Q. 8, 10 (Oct. 1957).

[323] Roth v. United States, 354 U.S. 476, 487 n.20 (1957).

[324] *Ibid.*

[325] *Id.* at 499–500.

[326] Professor Schwartz, however, suggests that the Court "may have been trying to bring existing law up to the level of the *Model Penal Code* by the *tour de force* of declaring it was already there," Schwartz, *supra*

We are driven to the conclusion that the verbal formula for obscenity approved by the Court in the *Roth-Alberts* opinion is not a single formula at all but one that embraces all of the current definitions of obscenity,[327] including that of the *Model Penal Code.*[328] Any of these verbal formulas may be constitutionally acceptable as a *definition* of "obscenity,"[329] since none of them judges material by the effect of isolated passages on particularly susceptible persons.[330] So we are left in the unhappy position of the delegates to the Geneva Conference on the Suppression of the Circulation and Traffic in Obscene Publications, who discovered that they could not define obscenity, "after which, having triumphantly asserted that they did not know what they were talking about, the members of the Congress settled down to their discussion."[331] We know only that material tested for obscenity must be judged as a whole instead of by its parts and by its appeal to or effect upon average persons instead of the weak and susceptible. But of what it is that must be judged in this fashion we know little save that it deal with sex in any of its many manifestations.

2. *The Standard Applied: Hard-Core Pornography*

Although the Court's verbal formula tells us little or nothing about the essence of obscenity as a constitutional concept, it seems clear that most of the Justices must have something fairly definite in mind—something they apparently are not yet able or ready to describe. For in a number of instances they have applied an undisclosed concept of obscenity to a variety of materials.

To at least seven members of the Court, neither the motion picture *The Game of Love,* nor the magazines *Sunshine & Health, Sun Magazine* and *One, The Homosexual Magazine* were obscene.[332] If materials of this kind are not obscene, the Justices

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note 322, at 11, or that the Court for the time being did not espouse one or another of the available definitions but indicated a receptivity to the language of the *Model Penal Code. Id.* at 10–13.

In State v. Jackson, 356 P.2d 495 (Ore. 1960), the court noted the inconsistencies in the *Roth-Alberts* opinion and elected to adopt the *Model Penal Code's* definition of obscenity "as a proper standard for Oregon courts to follow." *Id.* at 507.

[327] See text accompanying notes 280–290 *supra.*

[328] MODEL PENAL CODE, *op. cit. supra* note 314, § 207.10(2) & Comment, pp. 10, 29–30.

[329] We are not here suggesting that any or all of them *are* constitutional, only that at this stage of our analysis they *may* be constitutionally acceptable for the reason given.

[330] See text following note 310 *supra.*

[331] HUXLEY, VULGARITY IN LITERATURE 1 (1930). And see CAUSTON AND YOUNG, KEEPING IT DARK 55 (1930).

[332] See notes 163, 165, 166, 168 *supra* and accompanying text. We say *seven* because Justices Black and Douglas probably cast their votes on grounds other than the non-obscenity of the material. For their views, see note 260 *supra* and accompanying text.

could scarcely have had in mind the same concept of obscenity as did the courts in the *Becker, Isenstadt,* and *Wepplo* cases, for in these cases the courts thought, respectively, that *Sunshine & Health* and *Solaire Universalle De Nudisme,* Lillian Smith's *Strange Fruit,* and Edmund Wilson's *Memoirs of Hecate County* were obscene.[333] And the Justices assuredly could not have endorsed a concept or definition of obscenity that embraced materials of such literary stature as *Strange Fruit* and the *Memoirs.*[334]

These applications of whatever concept of obscenity the Justices have in mind suggest only what, in the minds of the Justices, obscenity is not; they tell us little of what the Justices think obscenity is. For some indication of the concept of obscenity held by a majority of the Justices we turn to an instance in which, we are convinced, the developing concept of obscenity was applied by the Court—in the context of a case in which the obscenity of the materials was never in issue before the Court.

We have already noted that the *Roth* and *Alberts* cases reached the United States Supreme Court at a high level of abstraction, with the obscenity of the materials in both cases not in issue, and that the Solicitor General brought the cases down to earth with a carton of what he termed "black-market" or "hard-core"

The only other instances in which members of the Court have *applied* their concepts of obscenity to material before them are the following:

Justices Frankfurter, Harlan, and Whittaker considered that the motion picture "Lady Chatterley's Lover" was not obscene. See text accompanying note 220 *supra.*

Mr. Justice Harlan thought that the material in *Roth* was not hard-core pornography and that the material in *Alberts* was obscene. For descriptions of this material see note 80 and accompanying text, notes 88–89, and notes 101–102 and accompanying text. For Mr. Justice Harlan's views see text accompanying notes 135–36. Mr. Justice Harlan also suggested that D. H. Lawrence's *Lady Chatterley's Lover,* presumably in its unexpurgated edition, *might* be obscene, Roth v. United States, 354 U.S. 476, 506 (1957), but that James Joyce's *Ulysses* and Boccaccio's *Decameron* were not. *Id.* at 498.

Mr. Chief Justice Warren, stressing Roth's and Alberts' reprehensible conduct, thought the materials in both cases were obscene in the particular circumstances of these two cases. See text accompanying notes 139–40 *supra.*

[333] See State v. Becker, 364 Mo. 1079, 272 S.W.2d 283 (1954); Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945); People v. Wepplo, 78 Cal. App. 2d 959, 179 P.2d 853 (1947). The court in the *Becker* case and the Supreme Court disagreed on the obscenity of nudist magazines; *Game of Love* and *One* were far more objectionable than *Strange Fruit* and *Memoirs of Hecate County.*

[334] It is true, however, that *Memoirs of Hecate County* contained one detailed description of sexual intercourse, and that this element was absent in the materials held not obscene in the per curiam decisions. See notes 163, 165, 166, 168 *supra.* Yet on almost any scale of social values the *Memoirs* would rank higher than those materials. See pp. 95–99 *infra,* for a consideration of the importance of aesthetic and other social values.

pornography.[335] In voting to sustain the constitutionality of the obscenity statutes of California and of the United States, Justices Frankfurter, Burton, Clark, Brennan, and Whittaker must have had material of this kind in mind[336] for hard-core pornography, particularly in pictorial form, is so blatantly shocking and revolting that it would have been impossible for the Justices to put it out of mind.[337] Since the basic issue before the Court was only the constitutionality of the statutes on their faces and in a vacuum, without regard to their application in the two cases, it seems likely that the Court upheld their constitutionality as imaginatively applied to hard-core pornography.

We conclude, therefore, that the concept of obscenity held by most members of the Court is probably hard-core pornography, a conclusion consistent with the Court's "rejection of obscenity as utterly without redeeming social importance."[338] But we still do not know whether hard-core pornography exhausts the category of the obscene, or whether some types of material may constitutionally be held obscene though not pornographic. For an answer to this question we must await clear-cut decisions of the Supreme Court in cases involving such materials as undisguised girlie magazines and Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn*[339] or, perhaps better yet for this purpose, his *Quiet Days at Clichy*.

Meanwhile, we shall need an understanding of the nature of "black-market" or "hard-core" pornography. But a satisfactory definition of the term is not easy to come by. In the *Roth* case the Solicitor General did not attempt a definition; he contented himself with brief and general descriptions of the types of material constituting the category.[340] Others writing about hard-core pornography also speak of it as if its essential nature were self-evident and needed little or no delineation;[341] and the same is true of most references to "pornography" unadorned by the qualifying adjectives "black-market" or "hard-core."[342] Yet it may be possible to arrive at a better understanding of the nature of hard-core pornography through a satisfactory explanation of the nature and function of just plain pornography. Here anthropologist Margaret Mead comes to the rescue.

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[335] See text accompanying note 119 *supra*.

[336] Mr. Justice Harlan also had material of this kind in mind in the *Roth* case, for he argued that the federal government had power to censor only hard-core pornography and then found that the material in *Roth* did not fall into that category. In the *Alberts* case, he concluded that the material was such that its suppression would not so "interfere with the communication of 'ideas' in any proper sense of that term" as to violate due process, but he did not say whether this material was pornographic, or whether it was something short of hard-core pornography but close enough to warrant state censorship. See text accompanying notes 135 & 136 *supra*.

Mr. Chief Justice Warren also examined the material in the *Roth* and *Alberts* cases, but he emphasized the reprehensible nature of the defendants' conduct, indicating that the material might not be obscene in different circumstances. See text accompanying note 137–140 *supra*.

[337] Years ago, one of the authors was for a time a police officer and, in making searches under a warrant or incident to arrest, occasionally unearthed pictorial pornography. Those who have never been exposed to material of this kind may get some notion of its general nature from one of the common scenes portrayed in photographic prints: women masturbating with a variety of implements ranging from bananas to broomsticks. For further indications of the character of hard-core pornography see notes 345–57 *infra* and accompanying text.

[338] Roth v. United States, 354 U.S. 476, 484 (1957).

[339] These were held obscene in Besig v. United States, 208 F.2d 142 (9th Cir. 1953).

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[340] He said:

> This is commercially-produced material in obvious violation of present law. . . . This material is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to portray the material in pseudo-scientific or "arty" terms. The production is plainly "hard-core" pornography, of the most explicit variety, devoid of any disguise.
>
> Some of this pornography consists of erotic objects. There are also large numbers of black and white photographs, individually, in sets, and in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. There are small printed pamphlets or books, illustrated with such photographs, which consist of stories in simple, explicit, words of sexual excesses of every kind, over and over again. No one would suggest that they had the slightest literary merit or were intended to have any. There are also large numbers of "comic books," specially drawn for the pornographic trade, which are likewise devoted to explicitly illustrated incidents of sexual activity, normal or perverted. . . . It may safely be said that most, if not all, of this type of booklets contain drawings not only of normal fornication but also of perversions of various kinds.
>
> The worst of the "hard-core" pornographic materials now being circulated are the motion picture films. These films, sometimes of high technical quality, sometimes in color, show people of both sexes engaged in orgies which again include every form of sexual activity known, all of which are presented in a favorable light. The impact of these pictures on the viewer cannot easily be imagined. No form of incitement to action or to excitation could be more explicit or more effective.

Brief for the United States, pp. 37–38, United States v. Roth, 354 U.S. 476 (1957).

The Solicitor General also sought to distinguish hard-core pornography from material in "the borderline entertainment area." He said:

> The distinction between this [hard-core pornography] and the material produced by petitioner and others, as discussed above, is not based upon any difference in intent. Both seek to exploit the erotic market place. The difference is that the "black market" traffickers make no pretence about the quality and nature of the material they are producing and offering.

Id. at p. 37.

[341] See, *e.g.*, Bromberg, *Five Tests for Obscenity*, 41 CHI. B. RECORD 416, 418–19 (1960) (hard-core pornography is "readily identifiable" and needs no "legal geiger counter . . . to apprize the viewer of the nature of hard-core materials").

D. H. Lawrence's "genuine pornography" seems to be pretty much the same as the Solicitor General's "black market" or "hard-core" pornography. Lawrence once wrote:

> But even I would censor genuine pornography, rigorously. It would not be very difficult. In the first place, genuine pornography is almost always underworld, it doesn't come into the open. In the second, you can recognize it by the insult it offers, invariably, to sex, and to the human spirit.

"We may define pornography cross-culturally" Dr. Mead says, "as words or acts or representations that are calculated to stimulate sex feelings independent of the presence of another loved and chosen human being."[343] She finds that "an essential element in pornography" is that it has "the character of the daydream as distinct from reality," and explains this element as follows:

> True, the adolescent may take a description of a real event and turn it into a daydream, the vendor of pornography may represent a medical book as full of daydream material, but the material of true pornography is compounded of daydreams themselves, composed without regard for any given reader or looker, to stimulate and titillate. It bears the signature of nonparticipation—of the dreaming adolescent, the frightened, the impotent, the bored and sated, the senile, desperately concentrating on unusualness, on drawing that which is not usually drawn, writing words on a plaster wall, shifting scenes and actors about, to evoke and feed an impulse that has no object: no object either because the adolescent is not yet old enough to seek sexual partners, or because the recipient of pornography has lost the precious power of spontaneous sexual feeling.[344]

Margaret Mead's conception of pornography as daydream material calculated to feed the autoerotic desires of the immature or

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> Pornography is the attempt to insult sex, to do dirt on it. This is unpardonable. Take the very lowest instance, the picture post-card sold underhand, by the underworld, in most cities. What I have seen of them have been of an ugliness to make you cry. The insult to the human body, the insult to a vital human relationship! Ugly and cheap they make the human nudity, ugly and degraded they make the sexual act, trivial and cheap and nasty.
>
> It is the same with the books they sell in the underworld. They are either so ugly they make you ill, or so fatuous you can't imagine anybody but a cretin or a moron reading them, or writing them.

LAWRENCE, PORNOGRAPHY AND OBSCENITY, IN SEX, LITERATURE AND CENSORSHIP 74–77 (1953).

[342] See Ellis, *The Revaluation of Obscenity*, MORE ESSAYS IN LOVE AND VIRTUE 130 (1931); Cairns, *Freedom of Expression in Literature*, 200 ANNALS 76, 85 (1938).

[343] Mead, *Sex and Censorship in Contemporary Society*, NEW WORLD WRITINGS 7, 18 (Third Mentor Selection 1953).

[344] *Id.* at 19. Dr. Mead makes the same point in distinguishing pornography from "the bawdy, the ribald, the shared vulgarities and jokes, which are the safety valves of most social systems." *Id.* at 23. She continues:

> Pornography does not lead to laughter; it leads to deadly serious pursuit of sexual satisfaction divorced from personality and from every other meaning. . . . The difference between the music hall in which a feeble carrot waves above a bowl of cauliflower while roars of

perverted is supported by the Kronhausens' detailed analysis of pornographic books. For the Kronhausens found in pornographic books the same sexual fantasy that Dr. Mead emphasized so strongly.[345] Pornographic books, say the Kronhausens, are always made up of a succession of increasingly erotic scenes without distracting non-erotic passages.[346] These erotic scenes are commonly scenes of willing, even anxious seduction,[347] of sadistic defloration in mass orgies,[348] of incestuous relations consummated with little or no sense of guilt,[349] of superpermissive parent figures who initiate and participate in the sexual activities of their children,[350] of profaning the sacred,[351] of supersexed males and

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> laughter shake the audience of husband(s) and wives on their weekly outing, and the strip tease, where lonely men, driven and haunted, go alone, is the difference between the paths to heaven and hell, a difference which any society obscures to its peril.

Id. at 23–24.

[345] See Kronhausen, Pornography and the Law 178–243 (1959).

[346] *Id.* at 178–79.

[347]

> Characteristic of "obscene" books is the fact that in . . . seduction scenes the "victim" is, more often than not, a *willing collaborator.* In other words, the women who figure prominently in "obscene" books are generally as anxious to be seduced as the men are to seduce them. . . .
>
> Also characteristic of seduction scenes . . . is the fact that the stories emphasize the *physiological sex responses* of the participants; in this instance, particularly those of the women.

Id. at 195. (Emphasis added.)

[348]

> [D]efloration scenes with strong sadistic elements play an important role. These defloration and rape fantasies are psychologically significant in demonstrating the fusion of erotic and sadistic impulses, although it is highly characteristic of these fantasies that no matter what the degree of agony inflicted, the girl invariably disclaims any concern over her pain.

Id. at 203.

> [I]n almost every pornographic story which we examined, the *defloration is accomplished with the aid of others.* . . .
>
> The *participation* of others in these defloration scenes is so characteristic of "obscene" books that one could well list it as a separate criterion of identification. It combines, in itself, various psychological elements; for instance, the sadistic pleasure involved or the voyeuristic element in watching.

Id. at 205. (Emphasis added.)

[349] *Id.* at 207.

[350] *Id.* at 211.

[351] *Id.* at 216–17.

females,[352] of Negroes and Asiatics as sex symbols,[353] of male and particularly female homosexuality,[354] and of flagellation,[355] all described in taboo words.[356] The sole purpose of pornographic books is to stimulate erotic response, never to describe or deal with the basic realities of life.[357]

Many others have also noted in pornography its essential daydream quality, designed to feed the erotic fantasies of the sexually immature. D. W. Abse, for example, says that pornography is material that "simply encourages people to luxuriate in morbid, regressive, sexual-sadistic phantasy and cultivates this morbidity in them, tending to arrest their development."[358] Similarly, W. G. Eliasberg speaks of the appeal of pornography to "immature sexuality," which he says is "the non-genital, not individualized, not-loving, amorphous interest in sex, which we have come to know as characteristic of early stages of physical and psychological development toward sex."[359] London and Caprio note that those who are morbidly interested in or collect pornography "have a libido that is fixated at the paraphiliac level (psychic auto-eroticism)."[360] And Benjamin Karpman calls indulgence in pornography a form of psychic masturbation.[361]

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> In keeping with the unrealistic nature of "obscene" books, one of their outstanding characteristics is the emphasis which they place upon the exaggerated size of the male organ, the largeness of the testicles, and the copiousness of the amounts of seminal fluid ejaculated.

Id. at 221.

> In keeping with the wish-fulfilling nature of "obscene" writings, the female characters in these stories are just as men would like women to be: highly passionate, sensuous, and sexually insatiable creatures who like nothing better than almost continuous intercourse.
>
> Conspicuous by its absence in "obscene" writings is any trace of genuine modesty, restraint, or anxiety on the part of the women. . . .
>
> "Obscene" books stress the female discharge almost equally as much as the man's seminal fluid; this is, of course, to be expected, for if the women are supposed to be as responsive as "obscene" books would make us believe, there would be no better proof of this than reference to the physiological manifestations of their erotic excitement.

Id. at 227–28.

> [J]ust as "obscene" books describe men in a satyriasis-like condition of permanent sexual excitement, the women likewise do not seem to fit any cultural norms in our society and are represented as predatory females ever on the prowl for a new sexual partner or a new sexual experience. In this respect, females fulfill the fantasy and wish-fulfilling character of "obscene" literature.

Id. at 229.

[353] *Id.* at 229.

[354] *Id.* at 232.

> We find many supposedly Lesbian scenes all though the bulk of "obscene" literature and . . . some books are mainly devoted to Lesbianism. However, they clearly serve the purpose mainly of arousing the male reader, who reacts to them as a heterosexual situation, and not for any hypothetical Lesbians who may happen to read them.

Id. at 234.

> This is, undoubtedly, also the reason why we do not find many references to male homosexuality in "obscene" books. . . . The reason is that, generally speaking, homosexuality is not erotically stimulating to the average (heterosexual male) reader.

Id. at 234–35.

[355] *Id.* at 237–42.

[356] *Id.* at 219–21.

[357] *Id.* at 18.

[358] Abse, *Psychodynamic Aspects of the Problem of Definition of Obscenity*, 20 LAW & CONTEMP. PROB. 572, 586 (1955).

Seen in this light pornography as a concept assumes manageable form. Pornography is daydream material, divorced from reality, whose main or sole purpose is to nourish erotic fantasies or, as the psychiatrists say, psychic autoeroticism. This concept of pornography, together with the more detailed criteria developed by the Kronhausens, should provide a reasonably satisfactory and workable tool for distinguishing pornographic books from non-pornographic ones. As applied to non-literary material, however, it is not likely to be successful, for much widely accepted material (such as the "pin-up girl") is designed to serve the same function of feeding "auto-erotic reverie."[362] Some additional qualification is needed to cut the concept back to proper size. For this purpose, the qualifications "black-market" or "hard-core" appended to pornography may be useful to indicate that non-literary material must not only nourish erotic fantasies, but must be grossly shocking as well.[363] But even with these qualifications, the concept of black-market or hard-core pornography is likely to be exceedingly difficult to apply to some types of pictorial material. Its application to pictures portraying acts of sexual intercourse or perversion seems clear enough, but its application to nude pictures that do not portray such acts is likely to present insurmountable difficulties. In the *Roth* case, the Solicitor General conceded as much.[364]

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[359] Eliasberg, *Art: Immoral or Immortal*, 45 J. CRIM. L. & P.S. 274, 278 (1954). Dr. Eliasberg also noted:

> A pornographic author never finds adjectives (qualities) enough to bandy about. There is a hurricane of attributes, but no substance; there are parts, but no whole. It is the same with the emotions as with the erogenic zones: There are the zones, but no body to which they belong; [t]here are the emotions, but no personality to feel them; brush strokes but no painting and no painter.

Id. at 274. *Cf.* Mead's description of pornography in text accompanying note 344 *supra*.

[360] LONDON & CAPRIO, SEXUAL DEVIATIONS 627 (1950). "Paraphilia" is a term used in psychiatry to designate sexual deviation; "auto-eroticism" refers to sexual feeling or gratification that is self-induced, without sexual relations with another.

[361] KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 360 (1954). Abraham Kaplan notes that pornography "is not itself the *object* of an experience, esthetic or any other, but rather a *stimulus to* an experience not focused on it. It serves to elicit not the imaginative contemplation of an expressive substance, but rather *the release in fantasy of a* compelling impulse." Kaplan, *Obscenity as an Esthetic Category*, 20 LAW & CONTEMP. PROB. 544, 548 (1955). (Emphasis added.) See also CRAIG, THE BANNED BOOKS OF ENGLAND 154 (1937).

[362] Eric Larrabee says that for Americans sex is—

> an object of limitless potentialities for fantasy and envy. Our glamour figures, male and female, whose justification is, in other respects, obscure, serve to maintain an illusion that somewhere, for somebody, sex can be a full-time activity. . . .
>
> Expecting much of sex, but feeling as individuals that much is denied them, Americans, as a mass, create in the substance of suppressed desire the remarkable symbolic figures that are found here as in no other culture. The existence of "the great American love goddess" is more often noted than explained. . . . Her primary function is widely understood but rarely mentioned—that is, to serve as the object of auto-erotic reverie.

Beyond these relatively minor difficulties, the concept of black-market or hard-core pornography poses some fundamental problems of obscenity censorship. Granting that the definition of hard-core pornography can be used to separate the pornographic from the non-pornographic with reasonable accuracy in most instances, what of those persons who, like Samuel Roth and David Alberts, market non-pornographic material as if it were pornography, advertising it to appeal to cravings for erotic fantasy?[365]

Persons who market non-pornographic material but advertise it as if it were hard-core pornography, exploiting the craving of the sexually immature for autoerotic fantasy, are not an attractive lot. Their motives are bad, and their behavior is thoroughly reprehensible. As Margaret Mead says, "[T]he little fly-by-night publishers who sell repackaged serious literary works or serious scientific books with lurid promises of the titillation contained within the covers are comparable to the innkeeper who, unbeknown to the lovers who seek shelter under his roof, also conducts a voyeuristic brothel."[366] Yet we do not know at this stage whether material

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Larrabee, *The Cultural Context of Sex Censorship*, 20 Law & Contemp. Prob. 672, 683–84 (1955).

[363] We are not suggesting that mere offensiveness of material can make it obscene. See Lockhart & McClure, *supra* note 1, at 376–78. We are speaking here of pornography, which appeals to the sexually immature appetite for erotic fantasy, and in addition is grossly shocking.

[364] Brief for the United States, pp. 35–36, 103–104, United States v. Roth, 354 U.S. 476 (1957).

[365] For a description of Roth's business, see text accompanying notes 79–81 *supra*. See also the advertisement for *American Aphrodite* reproduced in Mead, *supra* note 343, at 18–19.

For a description of Alberts' business, see notes 100–102 *supra* and accompanying text. We have one of his advertisements before us. The first page is headlined "BANNED BY BIGOTS who can't stand the meaning of the word SEX BUT AVAILABLE TO YOU IF YOU HURRY." The rest of the advertisement is in keeping with the headline.

[366] Mead, *supra* note 343, at 18. She also says:

> The starved, unhappy adolescent, curious, ashamed, afraid to talk to anyone, restlessly lifting books off top library shelves, is a subject for compassion. But those commercial outfits which debase serious work belong in the same class as panderers, exploiting pitiful needs in

pushed in this fashion is entitled to constitutional protection. For the material is not hard-core pornography, and we do not yet know whether and in what circumstances material that falls short of that category can nevertheless be classed as obscene and therefore denied constitutional protection because of the manner in which it is marketed.[367]

Hard-core pornography poses a related problem when the constitutionally approved verbal formula for obscenity is applied to material of that kind. For the verbal formula speaks of obscenity's appeal to the prurient interest of *the average or normal person,* whereas hard-core pornography appeals to *the sexually immature* who use it to stimulate and feed their autoerotic reveries. To the normal, sexually mature person, hard-core pornography is repulsive, not attractive.[368] It may be, as Eric Larrabee suggests, that "the American public is composed largely of Peeping Toms,"[369] but their peeping is only at socially accepted and widely distributed material such as photographs of models in bathing suits;[370] there is no indication at all that they would find

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> a way that does not still the needs but makes them all the more insatiable.

Ibid.

[367] See pp. 79–80 *infra.*

[368] See Cairns, *supra* note 342, at 85; CRAIG, *op. cit. supra* note 361, at 154; LAWRENCE, *op. cit. supra* note 341, at 74–75; Lockhart & McClure, *supra* note 1, at 337–38.

Heywood Broun once observed:

> Sheer nastiness is feeble stuff. When I was a youngster and carefully shielded I, too, had the romantic notion that among the forbidden books were some powerful enough to steal away the very soul. By now I have read them and another illusion is gone. There is scarcely a kick in a barrel full. By what seemed a happy chance there fell into my hands, the other afternoon, a whole library of paper-backs, prepared in Paris for the American trade. Shock was the whole objective, but it was not there. Indeed, after less than half an hour of reading my only emotion was one of profound pity for the poor pornographers.

BROUN & LEECH, ANTHONY COMSTOCK 268–69 (1927).

In England, Rebecca West, noting the small and impoverished pornography shops on several London streets, concluded that pornography has little popular appeal and that most people are not much interested in it. CAUSTON & YOUNG, KEEPING IT DARK 11–12 (1930). See CRAIG, *op. cit. supra* note 361, at 154; Lockhart & McClure, *supra* note 1, at 337–38.

[369] Larrabee, *supra* note 362, at 684. Larrabee's argument is that "the great American love goddess," whose primary function is to serve as the object of autoerotic reverie, represents "the commercial exploitation of the assumption that the American public is composed largely of Peeping Toms." He finds support for the assumption in the approach to sex institutionalized by the advertising business and says, "To serve the hunger for the unattainable, we have brought into existence an entire class of women whose profession is catering to voyeurs, not even in the flesh, but through photographs—namely, the models." *Ibid.*

[370] Except on such fortuitous occasions as that in which the officers and men aboard the "Reluctant" in Thomas Heggen's *Mr. Roberts* found themselves. See HEGGEN, MISTER ROBERTS 83–94 (1948).

hard-core pornography attractive. Curiosity there may well be, but addiction to hard-core pornography, no. We are left, then, in a quandary. Hard-core pornography, which appeals only to the sexually immature, is clearly obscene, but by the Court's definition obscene material is material that appeals to the prurient interest of the average person—for whom hard-core pornography holds little attraction.

B. Constant or Variable Obscenity?

Both of these problems—the problem of what to do about nonobscene material that is marketed and advertised as if it were obscene, and the quandary presented by the inconsistency between the verbal formula for obscenity and the appeal of hard-core pornography—raise a basic issue that, at the present stage in the development of constitutional standards governing obscenity censorship, has been tentatively and perhaps almost inadvertently resolved one way. The issue, of course, is whether obscenity is an inherent characteristic of obscene material, so that material categorized as obscene is always obscene at all times and places and in all circumstances, or whether obscenity is a chameleonic quality of material that changes with time, place, and circumstance.

In the *Roth* and *Alberts* cases, Chief Justice Warren argued for a concept of variable obscenity:

> The line dividing the salacious or pornographic from literature or science is not straight and unwavering. . . . It is manifest that the same object may have a different impact, varying according to the part of the community reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.[371]

Then, finding that both Roth and Alberts "were engaged in the business of purveying . . . matter openly advertised to appeal to the erotic interest of their customers" and "were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect," the Chief Justice voted to affirm their convictions.[372] The Court's majority ignored Chief Justice Warren's argument, and Mr. Justice Harlan, dissenting in the *Roth* case, explicitly rejected it.[373]

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[371] Roth v. United States, 354 U.S. 476, 495 (1957).

[372] *Id.* at 495–96.

[373] "Nor do I think the statute can fairly be read as directed only at *persons* who are engaged in the business of catering to the prurient minded, even though their wares fall short of hard-core pornography." *Id.* at

The American Law Institute debated the same issue in considering the obscenity provisions of the *Model Penal Code.* In the debate, Henry Hart, who probably had in mind the concept of variable obscenity and wanted to emphasize it, urged that the criminal offense of disseminating obscene material be defined as "pandering to an interest in obscenity."[374] The Institute rejected Professor Hart's proposal because of its indefiniteness and its difficulty of enforcement.[375] Instead, after formulating a definition of obscenity, the Institute proposed that dissemination of obscenity be prohibited. But it excepted from the offense the dissemination of obscene material "to institutions or individuals having scientific or other special justification for possessing such material"[376] and added as a separate offense the advertising or promotion of material represented or held out as obscene.[377] Here, the Institute seems to have adhered to the concept of a constant rather than a variable obscenity, for under variable obscenity both of these situations would be handled in much the same way, without special provision. But it also declared that obscenity should be judged with reference to ordinary adults except when the material is designed for or directed "to children or other specially susceptible audience."[378] Consequently, the American Law Institute seems to have straddled the issue, adopting the concept of a partly variable obscenity.

Although the United States Supreme Court did not adopt a concept of variable obscenity in the *Roth* case when it had an opportunity to do so,[379] the issue is not a dead one. It was squarely raised in *United States v. 31 Photographs*[380] (the *Kinsey Insti-*

507–08. It should be noted that Mr. Justice Harlan was here giving only his *interpretation* of the Comstock Act, not his opinion on the *constitutionality* of a statute explicitly aimed at the personal conduct which the Chief Justice thought the federal and state governments had power to prohibit.

[374] MODEL PENAL CODE, *op. cit supra* note 314, at 1 & 14. Professor Hart's full definition of the offense was:

> Pandering to an interest in obscenity is a misdemeanor. Pandering means exploiting such an interest primarily for pecuniary gain, knowing that the interest exploited is an interest in obscenity for its own sake.

Id. at 1.

The concept of variable obscenity was widely accepted before 1957. See Lockhart & McClure, *supra* note 1, at 338 & 342.

[375] MODEL PENAL CODE, *op. cit. supra* note 314, at 14–16. "Would it be non-criminal for A to sell the books in his 'respectable' shop and criminal for B who has many questionable and titillating items displayed in his shopwindow?" *Id.* at 15.

[376] *Id.* at § 207.10(4)(c) & Comment, p. 17.

[377] *Id.* at § 207.10(6) & Comment, p. 53.

[378] *Id.* at § 207.10(2) & Comment, pp. 36–38.

[379] See text accompanying notes 371–73 *supra.*

[380] 156 F. Supp. 350 (S.D.N.Y. 1957). See Comment, 34 IND. L.J. 426 (1959).

tute case), where a federal district court adopted the concept of variable obscenity and ruled that hard-core pornography, imported from abroad by the Kinsey Institute for scientific study, was not obscene. The Department of Justice, sensing certain defeat, decided not to appeal.[381] And from other quarters, too, strong voices have spoken out with arguments favoring variable obscenity.[382] Until the issue reaches the Court in more clear-cut fashion than it did in the *Roth* and *Alberts* cases—where, although implicit in the facts of both cases, it was neither put in issue nor argued—we can only speculate on future developments. Since the issue is most likely to be presented in clear-cut fashion in a case like *Kinsey Institute*, involving a clearly defined special audience for the material in question, we reserve our speculation for discussion of the special audience problem.[383]

However the variable obscenity issue is resolved, the Court must still face the question whether, apart from special audiences or unusual circumstances, hard-core pornography exhausts the category of the constitutionally obscene. For a final resolution of the latter question, we can only await the Court's decision in cases involving such materials as undisguised girlie magazines or Henry Miller's *Quiet Days at Clichy*.[384] But this question we explore in the next topic because in our opinion the focus—if not the resolution—of this question is related to resolution of the problem of the audience.

C. THE AUDIENCE PROBLEM: WHOSE PRURIENT INTEREST?

One of the two most criticized aspects of the old *Hicklin* test for obscenity was its reference to particularly susceptible persons as the standard for judging material alleged to be obscene.[385] Literally applied, it would, as Judge Learned Hand pointed out as early as 1913, reduce all literature "to the standard of a child's library in the supposed interest of a salacious few."[386] Accordingly, most American courts in time came to reject this aspect of the *Hicklin* rule,[387] and, in 1957, the Supreme Court in *Butler v. Michigan*[388] gave constitutional sanction to the rejection.[389]

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[381] ABPC, Censorship Bull., April 1958, p. 1.

[382] Paul & Schwartz, *supra* note 170, at 239–44.

[383] See pp. 70–88 *infra* for a consideration of the audience problem.

[384] A case of this kind would require a reputable adult importer of the work, a reputable publisher who promotes the work to an audience of adult persons in a restrained manner, or a reputable book dealer who sells the work to an adult without emphasis upon its seamy episodes.

[385] See Lockhart & McClure, *supra* note 1, at 325–26, 338–40; Roth v. United States, 354 U.S. 476, 488–89 (1957).

[386] United States v. Kennerley, 209 Fed. 119, 120–21 (S.D.N.Y. 1913).

[387] See Lockhart & McClure, *supra* note 1, at 340.

[388] 352 U.S. 380 (1957).

[389] See text accompanying notes 44–46 *supra*.

In negating the use of particularly susceptible persons as the standard for judging obscenity, many courts spoke also of the positive side of the coin—they said that material must be judged by its effects upon the "average" or "normal" person instead of the weak and immature.[390] And the Supreme Court in the *Roth-Alberts* opinion used the terms "average person" and "normal person" interchangeably in referring to the person to whose prurient interest obscene material must appeal.[391] But what kind of person is this "average" or "normal" person who is to be employed as the touchstone for obscenity? And in what circumstances is he the proper person to be so employed?

Some courts, as in *Commonwealth v. Isenstadt*,[392] have described him as a composite representing all elements of society including the young and susceptible.[393] Others, like the trial court in the *Roth* case, have equated him with the man in the street.[394] And in the *Ulysses* case, Judge Woolsey referred to him as "a person with average sex instincts—what the French would call *l'homme moyen sensuel*—who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the 'reasonable man' in the law of torts and 'the man learned in the art' on questions of invention in patent law."[395]

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[390] Lockhart & McClure, *supra* note 1, at 340.

[391] Roth v. United States, 354 U.S. 476, 489–90 (1957).

[392] 318 Mass. 543, 62 N.E.2d 840 (1945).

[393]

> The thing to be considered is whether the book will be appreciably injurious to society . . . because of its effect upon those who read it, without segregating either the most susceptible or the least susceptible, remembering that many persons who form part of the reading public and who cannot be called abnormal are highly susceptible to influences of the kind in question and that most persons are susceptible to some degree, and without forgetting youth as an important part of the mass, if the book is likely to be read by youth.

Id. at 552, 62 N.E.2d at 845. See also Lockhart & McClure, *supra* note 1, at 340; *cf.* State v. Becker, 364 Mo. 1079, 1085, 272 S.W.2d 283, 286 (1954).

[394]

> The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. . . . The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community.

Record, pp. 25–26, *Roth v. United States,* quoted with approval, 354 U.S. at 490. See also Volanski v. United States, 246 F.2d 842, 844 (6th Cir. 1957).

[395] United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

The American Law Institute adopted this concept of the "ordinary adult."

1. Defects in the "Average" or "Normal" Person Test

None of these concepts of the "average" or "normal" person is wholly satisfactory. The Massachusetts formulation of the test as a composite of all elements of society retains most of the objectionable rigor of the old *Hicklin* rule; indeed, in the *Isenstadt* case[396] it resulted in denying normal adults access to Lillian Smith's *Strange Fruit* because, according to the court, the reading public includes many normal adolescents and adults highly susceptible to sexual stimulation as well as many abnormal children and adults who would be adversely affected by the book.[397]

The concept of the average person as the common man, or the man in the street, is less rigorous than the Massachusetts composite, but it, too, presents difficulties. If it is true that the common man knows little and cares less about literary qualities,[398] what is to be done with material of substantial aesthetic value that the common man peruses for his own private titillation, oblivious of its artistry?[399] Is such material to be suppressed even when it was the act of censorship itself that sent the otherwise unliterary persons on their stampede for a look at it?[400] If so, censorship proceedings against material would create the very circumstances making acceptable material obscene.

The appeal of hard-core pornography—which is the principal, if not the sole, occupant of the category "obscene"[401]—raises a serious defect in the conception of the "average" or "normal" person as either the common man or, more particularly, the person of average sex instincts. For hard-core pornography appeals to the sexually immature because it feeds their craving for erotic fantasy; to the normal, sexually mature person it is repulsive, not attrac-

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MODEL PENAL CODE, *op. cit. supra* note 314, § 207.10(2) & Comment, pp. 36–39.

[396] Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945).

[397] See note 393 *supra*.

[398] See Commonwealth v. Isenstadt, 318 Mass. 543, 553, 62 N.E.2d 840, 846 (1945).

[399] F. H. Bradley once noted that sometimes the sexual detail in literature breaks loose from an aesthetic whole. "[M]ost of the time the failure is in ourselves; but when this happens it is not art's failure. There may be some who can't appreciate art, and perhaps they should stay away from it. But what is not tolerable is that stunted natures should set up their defects as a standard." Bradley, *On the Treatment of Sexual Detail in Literature*, 2 COLLECTED ESSAYS 618, 625 (1935).

[400] When Edmund Wilson's *Memoirs of Hecate County* was prosecuted for obscenity, its entire first printing of 70,000 copies was promptly sold out. 150 Publ. Wk. 1506 (Sept. 21, 1946). And after Doubleday's conviction in New York for publishing the book, *Time* magazine observed: "The decision made thousands of citizens more impatient than ever to get their morals ruined." 48 Time, Dec. 9, 1946, pp. 24–25.

[401] See text accompanying notes 338–39 *supra*.

tive.[402] Consequently, neither the common man nor the person of average sex instincts is a suitable hypothetical person to use in determining whether hard-core pornography appeals to his prurient interest. If this were the exclusive test, hard-core pornography would never be obscene, although it is the one class of material now certainly obscene. Obviously, something is wrong here—so wrong that the test for obscenity by reference to its effects upon or appeal to the "average" or "normal" person will require clarification or modification.

Perhaps the easiest way out of the dilemma would be to recognize candidly that the reference to the average or normal person was simply a slip of the tongue, an expression of disapproval of the *Hicklin* rule's reference to particularly susceptible persons. It is easy to slip from a negative to a positive form of statement, using the positive as a way of stating the negative, though strictly speaking the two forms of statement are not identical. In this light, the statement that material is to be judged by its effects upon or appeal to the average or normal person is simply a way of stating that material disseminated to the general public must not be judged by its effects upon or appeal to the weak or susceptible, for that, as Mr. Justice Frankfurter said in the *Butler* case, would be "to burn the house to roast the pig."[403] This, we suspect, is what happened in the majority opinion in the *Roth* and *Alberts* cases, for the main thrust of that part of the *Roth-Alberts* opinion in which the reference to the "average" and "normal" person appeared was rejection of the *Hicklin* rule as "unconstitutionally restrictive of the freedoms of speech and press" because it "might well encompass material legitimately treating with sex."[404] If this interpretation is correct, the kind of person to be used as a standard in judging the effects or appeal of constitutionally obscene material is undetermined at this stage in the development of constitutional standards governing obscenity censorship.

In resolving the problem of the kind of "person" to be used in testing material for obscenity, a number of possibilities are open to the Court. It could, for example, adopt the Massachusetts concept of the average person as a composite representing all elements of society including the young and susceptible.[405] We reject this possibility because it retains too much of the extreme rigor of the old *Hicklin* rule and the Court has clearly indicated, by both words and action, that it will not accept or tolerate such a restrictive standard.[406]

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[402] See note 368 *supra.*

[403] 352 U.S. at 383.

[404] 354 U.S. at 489–90.

[405] See note 393 *supra* and accompanying text.

[406] See text accompanying notes 163–69 & 300 *supra.*

2. *Constant Obscenity: Its Application and Problems*

If the Court adheres to its concept of a constant rather than a variable obscenity[407] and if, as we believe, it will limit the constitutionally obscene to hard-core pornography or material very close to that line,[408] the Court will have to develop a new kind of hypothetical person for testing material. For hard-core pornography holds little or no attraction for the normal, sexually mature adult, and it is not disseminated to the general public for the simple reason that most people won't buy it. As D. H. Lawrence once observed, "[G]enuine pornography is almost always underground; it doesn't come into the open."[409] Consequently, there is neither reason nor occasion to employ the average or normal person as the standard for testing for hard-core pornography. Given the nature and appeal of hard-core pornography, it is clear that the proper hypothetical person to use in testing material of this kind is not the average or normal person but rather the sexually immature who wallow in hard-core pornography to satisfy their immature craving for erotic daydreams.

So far, so good—but with respect to hard-core pornography only. Should the Court's concept of a constant obscenity turn out to embrace material that is not hard-core pornography but close to the line, present constitutional standards will leave us hopelessly at sea. By what hypothetical person's standards, for example, are we to determine whether such a book as Henry Miller's *Quiet Days at Clichy* is "obscene"? We cannot use the sexually immature as the standard, for the book is not limited in its appeal to persons of that kind. If the book were to be placed on the market for the general public, many normal, sexually mature adults would doubtless buy and read it. In these circumstances the mature reading public could not constitutionally be denied access to the book simply because the sexually immature might find in it food for their erotic fantasies.[410] If the sexually immature person could not be employed in these circumstances, what kind of person, if any, should be? Assuming that some kind of hypothetical person is required, it is clear that he must be representative of the mature reading public.[411] But even with a suitable hypothetical person to employ in testing the material—and assuming obscenity to be a constant quality—we would still need a reasonably satisfactory test for identifying material that is obscene, though not hard-core pornography.

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[407] See text accompanying notes 371–73 *supra.*

[408] See text accompanying notes 338–39 *supra* and 410–15 *infra.*

[409] LAWRENCE, *op. cit. supra* note 341, at 75. See also note 340 *supra,* where the Solicitor General also noted the clandestine way in which hard-core pornography is handled.

We do not mean to suggest that the peddlers of hard-core pornography never push it or offer it to the public. They sometimes do, but only in the hope of finding among the general public those sexually immature persons who will be attracted by and purchase their material. *Cf.* Rebecca West's observation on the pornography shops in London, note 368 *supra.*

[410] See text accompanying notes 44–65 *supra.*

We are confident that ordinary nudist magazines, motion pictures like *The Game of Love*, and books like the unexpurgated edition of D. H. Lawrence's *Lady Chatterley's Lover* are not obscene under the concept of constant obscenity currently held by most members of the United States Supreme Court.[412] We are also confident that hard-core pornography is obscene under that concept.[413] Our problem is to find some way to draw a line—somewhere between these two classes of material—that will separate from non-obscene material the material that is obscene though not hard-core pornography. What test will with tolerable accuracy distinguish Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn* from *Lady Chatterley's Lover?* Or if the *Tropics* are not quite raw enough to be classed obscene, what test will distinguish these novels from his *Quiet Days at Clichy,* which is rawer still? Here we have had to throw up our hands in despair. All of these books in varying degree might well appeal to the prurient interest or have "a tendency to excite lustful thoughts"[414] of sexually mature adult readers. All, in varying degree, go into detailed descriptions of sexual intercourse. And portions of all, again in varying degree, are raw. We can find no rational way to distinguish them one from another and are thrown back to the purely visceral reaction that of this lot *Quiet Days* is the rawest and *Lady Chatterley's Lover* the least raw.[415] And we suspect that the United States Supreme Court, faced with the extremely difficult task of formulating a satisfactory constitutional test for material that falls somewhere between *Lady Chatterley's Lover* and hard-core pornography, might well decide to hold the line for constant obscenity at the level of hard-core pornography.

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[411] He could be described as the sexually mature, heterosexual adult or perhaps, in the *Ulysses* terminology, as the person of average sex instincts. But we doubt that the common man or man in the street concept would be wholly satisfactory, for many, perhaps most, ordinary adults seldom or never read books. See notes 393 & 394 and text accompanying note 395 *supra* for descriptions of the average or normal person.

[412] See notes 163–68 *supra* and accompanying text. The United States Court of Appeals for the Second Circuit found *Lady Chatterley's Lover* not obscene. Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960). The Department of Justice must share this opinion, for it decided not to appeal the decision. N.Y. Times, June 3, 1960, p. 29, col. 6.

We are here referring to nudist magazines of the type found not obscene by the Supreme Court. See note 166 *supra.* Since then the nature of *Sunshine and Health* apparently has been so substantially altered that we cannot be confident that current issues of the magazine are clearly not obscene. See People v. Cohen, 205 N.Y.S.2d 481 (Queens County Ct. 1960).

[413] See text accompanying notes 335–38 *supra.*

[414] This is one of the tests the Court said it approved in the *Roth-Alberts* cases. But see analysis of this statement in text accompanying notes 301–10 *supra.*

[415] Although *Lady Chatterley's Lover* has qualities that are lacking in Miller's novels—an obviously ideological property and a tenderness that

No matter how this basic problem is resolved, the concept of a constant obscenity will leave unanswered a number of important questions. What is to be done about material, indisputably hard-core pornography, that is addressed to an audience of social scientists for purely scientific purposes?[416] What, if anything, is to be done about the panderer who pushes non-obscene material as if it were obscene, seeking out an audience of the sexually immature to exploit their craving for erotic fantasy?[417] And although the general public cannot constitutionally be denied access to non-obscene material because it might have a deleterious influence upon youth,[418] is it constitutionally permissible to prohibit the dissemination of such material to adolescents?[419]

Constant obscenity does not provide answers to these questions. When, as in the *Kinsey* case,[420] hard-core pornography is addressed to an audience of social scientists solely for scientific study, courts are forced to write an exception into the obscenity statute that the legislature did not enact.[421] The panderer who advertises non-obscene material as if it were obscene and the adolescent who wants access to material disseminated to the general public are beyond the reach and protection of obscenity statutes. The former probably may be reached by statutes prohibiting false advertising,[422] but the protection of the latter is made difficult by the

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pervades the whole book—these are hardly qualities that can help to distinguish between material that is not obscene and material that is obscene though not hard-core pornography. Moreover, *Quiet Days at Clichy* is a much more shocking book than *Lady Chatterley's Lover*. Consequently, a decision of the Supreme Court that a book like *Lady Chatterley's Lover* is not obscene would not answer our question.

[416] See text accompanying note 380 *supra*.

[417] See text accompanying notes 365–67 *supra* and 436–37 *infra*.

[418] This was the effect of the decision in the *Butler* case. See text accompanying notes 60–65 *supra*.

[419] This question was not raised in the *Butler* case. See note 64 *supra* and accompanying text.

[420] United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957); See Comment, 34 IND. L.J. 426 (1959).

[421] No legislative body we know of—except that of Virginia—has written such an exception into its obscenity statute. See VA. CODE ANN. § 18.1–236.3(10) (Supp. 1960). The closest any other legislature has come is the United States Congress in its enactment of the customs law, which grants a discretionary exception for "classics or books of recognized and established literary or scientific merit." 46 Stat. 688 (1930), 19 U.S.C. § 1305(a) (1958).

[422] See MODEL PENAL CODE, *op. cit. supra* note 314, at § 207.10(6) & Comment, p. 53. Section 207.10(6) provides that "a person who adver-

drafting hurdle set up by the Court in *Winters v. New York,*[423] which requires a high degree of precision in statutes limiting free expression.

3. *Variable Obscenity: Its Application, Problems and Advantages*

(a) Delineation of the Audience

Variable obscenity provides solutions to most of the problems that constant obscenity leaves unresolved. Under variable obscenity, material is judged by its appeal to and effect upon the audience to which the material is primarily directed. In this view, material is never inherently obscene; instead, its obscenity varies with the circumstances of its dissemination. Material may be obscene when directed to one class of persons but not when directed to another.[424] Consequently, the concept of a variable obscenity provides a ready answer to the question posed in the *Kinsey* case: Is material, indisputably hard-core pornography, constitutionally "obscene" when it is directed exclusively to an audience of social scientists solely for the purpose of scientific study? The answer is clearly, "Of course not."[425] Variable obscenity also makes it possible to reach, under obscenity statutes, the panderer who advertises and pushes non-pornographic material as if it were hard-core pornography, seeking out an audience of the sexually immature who bring their "pornographic intent to something which is not itself pornographic."[426] Because it focuses attention on particular types of audiences, variable obscenity may, in addition, contribute to a solution of the problem created by the efforts of the sexually immature to gain access to material aimed at a different audience, by suggesting ways of confining such material in appropriate channels.[427] And if the United States Supreme Court should abandon its current but tentatively held concept of constant obscenity,[428] it is clear that the Court could, in applying the variable test for obscenity, include material that is not hard-core pornography within the category of the constitutionally ob-

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tises or otherwise promotes the sale of material represented or held out by him to be obscene commits a misdemeanor."

[423] 333 U.S. 507 (1948). See MODEL PENAL CODE, *op. cit. supra* note 314, at pp. 55–57.

[424] See Lockhart & McClure, *supra* note 1, at 340–42, 394–95.

[425] This was the answer given by Judge Palmieri in that case, though not quite so emphatically. See United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957). See also Comment, 34 IND. L.J. 426 (1959).

[426] Mead, *supra* note 343, at 18. For an illustration of how the variable obscenity concept reaches the panderer of non-pornographic material, see United States v. Rebhuhn, 109 F.2d 512 (2d Cir. 1940).

[427] See text accompanying notes 455–70 *infra* for consideration of this problem.

[428] See text accompanying notes 371–73 *supra.*

scene.[429] But despite these apparent advantages, variable obscenity is not without its own problems and difficulties.

To be a reasonably satisfactory tool for discriminating between obscene and non-obscene material in circumstances that vary in many different ways, variable obscenity requires, in each case, careful delineation of the audience to which material is primarily directed and evaluation of the nature of the material's appeal to or impact upon persons making up the particular audience.

In defining the primary audience of material it is important to recognize that most material is not directed to and does not reach the general public. Instead, although publicly offered, it is directed to and reaches only particular segments of the general public. The patrons of an art theater are different from those who patronize the usual drive-in theater, just as both of these audiences are, in varying degrees, different from the theater-goers who patronize the legitimate stage. The patrons of museums are not at all like those who frequent penny arcades to shoot at moving targets and look at the peep-shows. Different types of books have different audiences, just as different types of magazines appeal to different audiences.[430] Radio and television have audiences that vary with the nature of particular programs and the hour of the day.[431]

The existence of substantial variations in audience appeal within every channel of communication is well known but often overlooked by those who state that material must be tested for obscenity by the standard of the average, normal, or ordinary person. Under variable obscenity the concept of the average or normal person has little place. Instead, variable obscenity requires first a determination of the audience to which the material is primarily directed, and then, as the standard for testing the material, the postulation of a hypothetical person typical of that audience.

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[429] See text accompanying notes 436–37 *infra.*

[430] For example, the audience for inexpensive paper-bound books is broader than the audience for books in hard covers or other trade editions. See Lockhart & McClure, *supra* note 1, at 302–03.

This variability in audience applies even more to magazines, many of which have carved out their own special audiences. The household with *The Atlantic Monthly* on its coffee table is not likely to have beside *The Atlantic Monthly* a copy of *True Confessions.* In New Metropolitan Fiction, Inc. v. Dell Pub. Co., 19 F.2d 718 (D.C. Cir. 1927), the publisher of the magazines *Marriage* and *Marriage Stories* resisted a competitor's registration of a trade mark for *Modern Marriage* magazine. In affirming the Patent Commissioner's denial of the registration, the court pointed out that all three magazines were aimed at an audience of the same class and then noted that "this class is not composed of discriminating buyers; the record, indeed, contains testimony to the effect that 'the type of people who read "Marriage" and "Marriage Stories" are usually of the same intelligence of a normal school child of 11 years of age.' " *Ibid.*

[431] The soap-opera is a daytime phenomenon in both radio and television; evening hours are never wasted on it for obvious reasons. *Cf.* Larrabee, *supra* note 362, at 687 n.72.

But the hypothetical person for testing variable obscenity must not be typical of the material's peripheral audiences; he must be a hypothetical representative of only its primary audience. For inclusion of the peripheral audience would often lead to the denial of material to its primary audience simply because it might be deleterious to a few on the periphery, thus returning us to the clutches of the rejected *Hicklin* rule. In *Commonwealth v. Isenstadt*,[432] where the court included among the "reading public" the highly susceptible, the abnormal, and the "many adolescents" who were "avid readers of novels,"[433] Lillian Smith's *Strange Fruit* was held obscene. Surely, if the United States Supreme Court were to adopt the concept of a variable obscenity, it would insist that the peripheral audience be rigidly excluded from consideration.

(b) The Nature of the Appeal to the Audience

Although we may have found the proper hypothetical person to use as the standard in testing material for variable obscenity, we still know little of the nature of material that, tested by such a standard, is obscene. Following the definition of obscenity set out in the *Roth-Alberts* opinion, we presume that the material would have to appeal to our hypothetical person's prurient interest; but of the nature of that appeal we know next to nothing.[434] As before, we are forced to turn to pornography to gain some understanding of material the Court might regard as obscene if it were to adopt the concept of a variable obscenity.[435]

Assuming, as we do, that hard-core pornography is the principal or perhaps even the exclusive concept of obscenity currently held by most members of the United States Supreme Court,[436] it seems likely that the Court would regard as obscene, under variable obscenity, material that is primarily directed to an audience of the sexually immature for the purpose of satisfying their craving for erotic fantasy, whether or not the material is intrinsically hard-core pornography. Thus, obscenity statutes could constitutionally be employed to reach persons who, like Samuel Roth and David Alberts, advertise material that is not intrinsically pornographic as if it were hard-core pornography, seeking out an audience of the sexually immature to exploit their pitiful needs.[437]

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[432] 318 Mass. 543, 62 N.E.2d 840 (1945).

[433] *Id.* at 552, 557, 62 N.E.2d at 845, 848.

[434] See text accompanying notes 313—19 *supra.*

[435] See text accompanying notes 335—37 *supra.*

[436] See text accompanying notes 338—39 *supra.*

[437] See, *e.g.*, United States v. Rebhuhn, 109 F.2d 512 (2d Cir. 1940). See also Mead, *supra* note 343, at 18.

In these circumstances, both the panderer and the members of his sexually immature audience treat the material as if it were hard-core pornography.

When material is thus *treated* as hard-core pornography, the nature and appeal of hard-core pornography seems to furnish a reasonably satisfactory tool for separating the obscene from the non-obscene, regardless of its intrinsic nature. But when material is neither intrinsically hard-core pornography, nor treated as such, variable obscenity leaves us just as much at sea as did constant obscenity and for the very same reasons.[438] And we suspect that should the Supreme Court adopt the variable obscenity concept, it might well draw the constitutional line at the level of material that is treated as hard-core pornography.[439]

On the merits, there is much to be said for drawing the line at this point under a variable obscenity concept. Control over all material treated as hard-core pornography would leave free from control very little material that can reasonably be regarded as socially undesirable. For any material directed primarily to an audience of the sexually immature for the purpose of feeding their craving for erotic fantasy would be considered obscene, whatever its intrinsic nature when directed at a mature adult audience. At the same time, the nature and appeal of hard-core pornography provides a workable standard that would eliminate the shadowy area into which we must move if we go beyond hard-core pornography.

Assuming the Court adopts such a standard, its application would require a careful delineation of the material's primary audience and then a determination of whether, in the circumstances and judged by a hypothetical person typical of those making up the primary audience, the material's sole or predominant appeal is to a sexually immature craving for erotic fantasy. This two-step process, we believe, provides a reasonably workable and discriminating method of distinguishing between the obscene and the non-obscene in a wide variety of situations. Indeed, courts had been doing just this for years,[440] until the constant obscenity concept of the *Roth-Alberts* opinion threw some of them into confusion.[441]

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[438] See text accompanying notes 412–15 *supra.*

In addition to the Henry Miller books, the girlie magazines—which by their very nature have special audiences made up of or bordering upon the sexually immature—would present enormous difficulty. And what would we do with standard material advertised generally in bad taste, such as a motion picture advertised as "frank," "daring," or "sexsational"?

[439] Compare text following note 415 *supra.*

[440] See Lockhart & McClure, *supra* note 1, at 340–41.

[441] See, *e.g.*, Klaw v. Schaffer, 151 F. Supp. 534 (S.D.N.Y. 1957), *aff'd per curiam*, 251 F.2d 615 (2d Cir. 1958); City of Cincinnati v. King, 107 Ohio App. 453, 159 N.E. 767, *affirming* 6 Ohio Op. 2d 313, 152

(c) An Impediment to Enforcement?

Yet it must be conceded that variable obscenity presents some practical difficulties in law enforcement. A police officer in making an arrest or a magistrate at a preliminary hearing cannot always "make necessary preliminary judgments from the book or picture itself, without, for example, inquiring whether an itinerant peddler is offering his wares only to rare book collectors."[442] It is also true that in the prosecution of obscenity cases variable obscenity sometimes requires evidence beyond the material itself. These, however, do not seem to us to be sufficiently important objections to variable obscenity to justify its rejection as impracticable..

We are convinced that in most obscenity cases sufficient evidence of the circumstances of dissemination of the material is readily available and is in fact commonly considered by police officers and magistrates in making their necessary preliminary judgments. For example, most art and photography schools employ live nude models for their students, and so far as we are aware the authorities never bring charges of obscenity against them even though there may be a few "students" on the periphery of the schools' primary audiences who enroll solely for erotic gratification. But in some cities newspapers carry advertisements inviting readers to photography studios where—the ads imply but do not explicitly state—attractively named females will pose for them in the nude.[443] No one should have the slightest difficulty distinguishing between the two cases, for in the latter case the studio is plainly appealing to a sexually immature audience. And we suppose, though we have no factual data to support our guess, that when studios of the latter kind get too far out of hand the authorities take steps to bring them into line. This is the sort of judgment that we are convinced police officers, magistrates, and prosecuting attorneys constantly make in all types of obscenity cases, upon evidence that is both adequate and readily available to them.

We are also convinced that the intrinsic nature of the material fairly allocates the practical burden of procuring evidence of the material's primary audience and its appeal to that audience.[444]

N.E.2d 23 (C.P. 1958); *cf. In re* Search Warrant of Property at 5 W. 12th St. v. Marcus, 334 S.W.2d 119, 126 (Mo. 1960).

[442] MODEL PENAL CODE, *op. cit. supra* note 314, at 38. Yet the American Law Institute itself proposed that obscenity be "judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience." *Id.* at § 207.10(2).

[443] We suppose that if a reader appears at the studio without a camera the studio will rent him one, with or without film.

[444] Competent prosecutors make extensive use of such evidence. Bromberg, *supra* note 341, at 419–21.

When the material is intrinsically hard-core pornography, the risk of an adverse ruling by the trier of fact will always, as a practical matter, place the burden of producing evidence of the material's primary audience and its lack of prurient appeal to that audience upon the disseminator of the material. The Kinsey Institute successfully produced such evidence in *United States v. 31 Photographs*.[445] On the other hand, when a work of apparent literary merit by a reputable author is issued by a respectable publisher, the burden of producing evidence relating to the audience will, as a practical matter, fall on the prosecution. For example, in the *Roth* case[446] one of the short stories contained in the volume of *American Aphrodite* upon which Roth was convicted was *Boy With a Trumpet*, by the distinguished Welch novelist, Rhys Davies. This short story was the title story of a collection of Davies' short stories published by Doubleday in 1951, and so far as we are aware neither Doubleday nor any book dealer anywhere in the country was disturbed by any official for selling the book. With material of this kind, the prosecution should carry the entire burden of proving that a particular disseminator of the book was, like Roth, a panderer directing the book at a primary audience of the sexually immature for the purpose of satisfying their appetite for erotic fantasy.[447]

Between these two extremes, the practical burden of producing evidence of the material's primary audience and of the nature of its appeal will shift in varying degrees, depending upon the intrinsic nature of the material. The more the material shows on its face the likelihood of its appeal to an audience of the sexually immature, the more the disseminator will have to scratch for evidence that he made a legitimate appeal to a different primary audience. Conversely, the more the material shows on its face that it is standard fare for sexually mature adults, the harder law-enforcement officers will have to dig to establish that a particular disseminator's primary audience is really made up of the sexually immature, to whom he purveyed the material for the purpose of feeding their desire for erotic fantasy. To illustrate, the mail order operator who, like David Alberts, handles "bondage photos" will have a very difficult time finding evidence to persuade the trier of fact that his primary audience is not made up of the sexually immature, for photographs of this type appeal only to a special variant of the sexually immature—those who associate sex with cruelty and brutality.[448] Law-enforcement officials will have an equally difficult time in proceeding against a book dealer for handling the unexpurgated edition of *Lady Chatterley's Lover,* for they will be required to prove that this dealer's primary audience for the book is made up of adolescents or other sexually immature persons.[449] But in proceedings against a dealer for handling Henry Miller's *Quiet Days at Clichy* or his *Tropic of Cancer* and *Tropic of Capricorn,* both sides will be likely to scramble for evidence of that dealer's primary audience for the books. If he is a reputable book dealer whose clientele is made up mainly of bibliophiles, he will of course seek to establish these facts, and law enforcement officials will then have difficulty proving that this particular dealer's primary audience for these books is a sexually immature one. But if the dealer is one of little or no repute, who handles along with the Miller novels only girlie and nudist magazines and other books predominantly sexual in nature, law enforcement officials will certainly make use of this evidence and the dealer will then have difficulty proving that his audience for the Miller books is not a sexually immature one.[450]

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[445] 156 F. Supp. 350 (S.D.N.Y. 1957). See Comment, 34 IND. L.J. 426 (1959).

[446] Roth v. United States, 354 U.S. 476 (1957).

[447] For a description of Roth's business, see text accompanying notes 79–81 *supra*.

We conclude therefore that variable obscenity is just as practicable in operation as constant obscenity. Those instances in which variable obscenity makes it necessary for law enforcement officials to dig hard for evidence that a particular person is disseminating material to a primary audience of the sexually immature for the purpose of feeding their desire for erotic fantasy are instances in which we believe they should be put to that effort and required to procure their evidence before proceeding with obscenity charges. We see no impediment to fair law enforcement here.

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[448] "Bondage photos" are photographs of women, scantily clad in black costumes, tied or strapped to various objects such as barber chairs in a variety of ways. Often they show two women, one tied or strapped and the other standing by with a whip. They are usually shown wearing high-heeled boots or button shoes and gauntlets. Their obvious appeal is only to the particular sub-class of the sexually immature whose fantasies link sex and flagellation.

See text accompanying notes 100–02 *supra* for a description of Alberts' business.

[449] We assume that the unexpurgated edition of *Lady Chatterley's Lover* might be obscene when directed at an audience of sexually immature persons. Otherwise, we take for granted that the book is not obscene. See text accompanying notes 412 *supra* & 492–94 *infra*.

[450] It seems clear to us that these Henry Miller novels would be clearly obscene under the variable obscenity concept when directed at an audience of the sexually immature. When directed at a mature audience, they would not be obscene, under either the constant or variable obscenity concept, if the United States Supreme Court limits obscenity to material that is hard-core pornography or to material that is treated as such. But we do not yet know whether the Court will draw the line at these points.

(d) Effect upon the Sexually Immature

Although adoption of the concept of variable obscenity would not make law enforcement impracticable, it may be objected that variable obscenity would jeopardize independent judicial review of obscenity decisions, effectively deprive the sexually immature segments of the populace of material that may occasionally have great social importance, and make the law appear ludicrous in denying to harmless old men the material from which they seek to keep alive the illusion of virility. Reserving discussion of the effect of variable obscenity upon independent judicial review for treatment with our consideration of judicial review in obscenity cases,[451] we dispose of the last two objections here.

It is, of course, true that in some circumstances variable obscenity may effectively deprive the sexually immature, including some harmless old men, of material that in other circumstances would not be obscene and might even have great social importance. But the circumstances in which this segment of the populace is deprived of otherwise non-obscene material are circumstances in which the material has no social importance for the audience to which it is primarily directed. Though denied to an audience of the sexually immature when primarily directed to such an audience, the material is preserved for all others; and even some of the sexually immature may peruse the material if they are willing to procure it from sources that do not channel it to a primary audience of the sexually immature.[452] And while it may seem ludicrous to deprive sexually immature but harmless old men of the material they use to nourish their illusions of sexual virility, it is not ludicrous to protect adolescents from material they crave to satisfy in erotic fantasy their immature hunger for sexual knowledge and experience.[453] Which leads us to the question of whether adolescents may constitutionally be denied access to material aimed at a primary audience of sexually mature adults because the material might be thought harmful in some way to adolescents gaining access to the material.[454]

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[451] See pp. 114–20 *infra*.

[452] The adult but sexually immature may, if they wish, turn to legitimate channels for the material. Consequently, the only material likely to be totally denied such persons is hard-core pornography, which, of course, the concept of a constant obscenity logically would also deny to them but without preserving the pornography for those to whom it is a proper subject of scientific study.

[453] "The starved, unhappy adolescent, curious, ashamed, afraid to talk to anyone, restlessly lifting books off top library shelves, is a subject for compassion." Mead, *supra* note 343, at 18.

[454] This is the question that was not raised or decided in the *Butler* case. See note 64 *supra* and accompanying text. The United States Supreme Court may have had a chance to grapple with the question in Mat-

(e) For Adults Only

The concept of a constant obscenity, which assumes that obscenity is an inherent quality of material that renders it unfit for everyone in all circumstances, provides no answer to this question. If adolescents are to be denied access to material legitimately directed to a primary audience of sexually mature adults, constant obscenity will require that statutes be couched in language proscribing something other than obscenity. And because of the *Butler* and *Winters* cases,[455] the drafting of such a statute presents a formidable hurdle—a hurdle that statutory draftsmen and legislators have not yet been able to overcome.[456]

Variable obscenity, however, furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance.[457]

As we have seen, variable obscenity by its very nature permits protection of adolescents from material when it is directed primarily to them for the purpose of satisfying in erotic fantasy their hunger for sexual knowledge and experience.[458] At the same time, it protects primary audiences of sexually mature adults from deprivation of material despite the fact that some persons on the periphery of the audience might gain access to the material for the purpose of satisfying their immature appetites for erotic fantasy.[459] But the problem presented by peripheral audiences of adolescents is more difficult to deal with. Is it possible to protect the primary audiences of sexually mature adults from deprivation

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thews v. Florida, 99 So. 2d 568 (Fla. 1951), where the defendant was convicted of exhibiting obscene pictures to a 12-year-old girl, but the Court denied certiorari. Matthews v. Florida, 356 U.S. 918 (1958). We do not know, however, whether the material in this case was hard-core pornography, or material legitimate for a primary audience of sexually mature adults but found to be too raw for a 12-year-old girl.

455. Butler v. Michigan, 352 U.S. 380 (1957); Winters v. New York, 333 U.S. 507 (1948).

456. See Paramount Film Distrib. Corp. v. City of Chicago, 172 F. Supp. 69 (N.D. Ill. 1959); Werner v. City of Knoxville, 161 F. Supp. 9 (E.D. Tenn. 1958); Katzev v. County of Los Angeles, 52 Cal. 2d 360, 341 P.2d 310 (1959); Police Comm'r of Baltimore v. Siegel Enterprises, Inc., 162 A.2d 727 (Md. 1960); Adams v. Hinkle, 51 Wash. 2d 763, 322 P.2d 844 (1958).

457. See text accompanying notes 424–50 *supra.*

458. But material designed merely to inform adolescents about sex, not to feed erotic fantasy, is not obscene even when directed to a primary audience of adolescents. United States v. Dennett, 39 F.2d 564 (2d Cir. 1930).

459. See text following note 433 *supra.*

of material that is not obscene *to them* and, at the same time, keep adolescents from the material because they would use it pornographically? This is, in short, the old problem of the "adults only" classification, a problem that at bottom is one of the feasibility of excluding a peripheral audience of adolescents without interfering with the primary audience of sexually mature adults.

The problem is most acute with books, both hard-cover and paper-bound, and with magazines. To insist that dealers in books and magazines determine at their peril which ones must not be sold to adolescents would be asking the impossible of them[460] and therefore would probably violate the constitutional requirement of scienter.[461] To prohibit dealers from exhibiting within the view of adolescents books and magazines that can be sold only to adults would raise the additional problem of undue interference with the material's primary audience.[462] Beyond these obstacles is the disrupting effect of "adult only" counters or shelves in book stores and at newsstands, for the "adult only" label would serve only to attract adolescents eager for a look at the forbidden fruit and would make it difficult for the dealer to prevent adolescent shoplifting of the books and magazines.[463] To avoid these difficulties cautious dealers might well decide to abandon all books and magazines claimed by any one to be unsuitable for adolescents. For these reasons, we suspect that the Supreme Court might well invalidate statutes designed to deny a peripheral adolescent audience access to books and magazines aimed at a primary audience of sexually mature adults, because of the tendency to reduce adult reading material to a level suitable for adolescents.[464] Admittedly, however, our prediction is made with no great assurance, for until the actual impact of such statutes on the distribution of books and magazines to their primary audiences of sexually mature adults becomes more clear, our argument is based on conjecture. Here, as in other situations, the Court is likely to feel its way, seeking to reconcile the conflicting interests of the primary and peripheral audiences in the light of actual experience with statutes of this type.

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[460] This is particularly true of dealers in paper bound books who ordinarily have little knowledge of the contents or nature of the books they handle.

[461] See pp. 103–08 *infra*, for a discussion of the scienter requirement.

[462] A Maryland statute was recently held unconstitutional for this reason, among others. Police Comm'r of Baltimore v. Siegel Enterprises, Inc. 162 A.2d 727 (Md. 1960), *cert. denied* 81 Sup. Ct. 273 (1960).

[463] Margaret Mead suggests that labeling material forbidden for certain audiences may serve a useful function in making readers aware of the kind of material they are reading. Mead, *supra* note 343, at 21–23.

[464] See Lockhart & McClure, *Obscenity in the Courts*, 20 LAW & CONTEMP. PROB. 587, 601–02 (1955).

In late 1956, the City of Chicago enacted a carefully drafted ordinance prohibiting the sale, to persons under 17 years of age, of any publication "which, considered as a whole, has the dominant effect of substantially arousing sexual desires in persons under the age of 17 years . . . ." *Hearings, supra* note 38, at 134. An ordinance of this kind would be a suitable vehicle for raising the question.

Motion pictures "for adults only" present fewer difficulties than books and magazines. Assuming a constitutional and workable system of film classification,[465] the classification of some motion pictures "for adults only" would have only an indirect—and possibly minor—impact upon adults constitutionally entitled to see such pictures. It is relatively easy to exclude adolescents from motion picture audiences without interfering with the admission of adults[466]—unlike the difficulty of excluding adolescents from business establishments selling books and magazines, which adolescents may have perfectly legitimate reasons for entering.[467] The immediate effect of excluding adolescents from theaters exhibiting motion pictures "for adults only" would be to cause economic loss. This economic loss could result indirectly in depriving adults of motion pictures not suitable for adolescents. With their mass audiences lost to television, motion picture producers may be compelled to rely heavily upon large audiences of adolescents, and therefore may be unwilling to risk substantial investment in the production of adult motion pictures.[468] Similarly, some motion picture exhibitors, lacking a sufficiently large audience of sophisticated adults interested in pictures "for adults only," may find it economically undesirable to exhibit motion pictures from which adolescents must be excluded. Although some sexually mature adults may, for these reasons, be deprived of convenient opportunities to view motion pictures they would like to see, we can see in the operation of these market factors no sufficient justification for invalidating legislation properly drafted to exclude adolescents from motion pictures directed to primary audiences of adults and properly classified "for adults only."[469] Although the Supreme

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[465] We have excluded the "prior restraint" problem from consideration in this Article. For adequate treatment, that problem would require a separate article. See Times Film Corp. v. City of Chicago, 29 U.S.L. WEEK 4120 (1961).

[466] As every liquor dealer knows, there may sometimes be difficulty in judging the correct age of customers. But in motion picture classification, the constitutional requirement of scienter will probably be extended to protect the exhibitor who admits a 16-year-old in the honest but mistaken belief that the adolescent is, for example, over 18, if that should be the age limit set by the classification system.

[467] To purchase, for example, a tube of toothpaste in a drug store or a copy of Alcott's *Little Women* instead of the unexpurgated edition of *Lady Chatterley's Lover.*

[468] Note, *"For Adults Only": The Constitutionality of Governmental Film Censorship by Age Classification,* 69 YALE L.J. 141, 149 (1959).

[469] The legislation would have to set out a proper and reasonably definite test for classifying motion pictures forbidden to adolescents and

Court has not yet considered the problem,[470] we are reasonably confident that such a statute will pass constitutional muster.

D. THE DOMINANT THEME OF MATERIAL CONSIDERED AS A WHOLE

In *Roth-Alberts*, the Supreme Court's contribution to the developing constitutional standards was not limited to its rejection of the "most susceptible persons" test. A second major contribution was its rejection of the "isolated passages" test of the old *Hicklin* rule, as that rule had come to be interpreted by American courts.[471] When in 1954 we urged that to protect the values of free expression a constitutional standard for obscenity should require that material be judged as a whole instead of by its parts,[472] most courts had already departed from the earlier "isolated passages" test as a matter of statutory interpretation.[473] But a constitutional requirement that material be judged as a whole was needed to protect material from a few narrow-minded courts that could be too shocked by four-letter words and frank passages to examine and understand their relation to the theme of the material as a whole.[474] Such a constitutional requirement was also needed,

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also specify age limits that reasonably correspond to the normal beginning and ending of adolescence. See text accompanying notes 436–37 *supra*, for our suggestion that a suitable and practicable test is whether the adolescents would *treat* the material *as if it were hard-core pornography*. And since individual differences among children bring them to adolescence at different ages, it is important that the legislation set age levels that correspond to the norm and not be extended to cover those few children whose entry into maturity is long delayed. In Paramount Film Distrib. Corp. v. City of Chicago, 172 F. Supp. 69 (N.D. Ill. 1959), the court upset a Chicago ordinance because it was "hopelessly indefinite" in its reference to any film that "tends toward creating a harmful impression on the minds of children" and because its age limit of 21 was unreasonably high. See Note, "*For Adults Only,*" *supra* note 468, for an analysis of the case.

[470] In the two motion picture cases since the *Roth-Alberts* decisions—Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959) and Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957)—the Court simply lifted censorship of "Lady Chatterley's Lover" and "The Game of Love," respectively, without consideration of the audience problem. In the *Times Film* case, the exhibitor volunteered to restrict his audience to persons 18 years of age or older. Appendix to Petition for a Writ of Certiorari, p. 5a. The master in the district court proceedings recommended to the court an injunction against censorship except for persons under 18. *Id.* at p. 30a. The district court and the court of appeals upheld the censorship without respect to age. Consequently, the validity of censorship by age classification was not before the United States Supreme Court when it reversed per curiam. See note 168 *supra* for a discussion of the case.

[471] See notes 298–300 *supra* and accompanying text.

[472] Lockhart & McClure, *supra* note 1, at 392.

[473] *Id.* at 345.

[474] See, *e.g.*, Besig v. United States, 208 F.2d 142 (9th Cir. 1953), where the court paid lip service to the "book as a whole" test but seemed to base its decision on isolated passages that shocked the judges, who made

in more than one-fourth of the states, to neutralize statutes that had incorporated the "isolated passages" test declaring material obscene when it "contains" obscene words or passages.[475]

The *Roth-Alberts* opinion established the needed constitutional requirement. The majority opinion of the Supreme Court is both deliberate and explicit on this point. In the paragraph setting out a constitutionally satisfactory standard for obscenity, the Court rejected the old *Hicklin* rule as "unconstitutionally restrictive of the freedoms of speech and press" because it judged obscenity "by *the effect of isolated passages* upon the most susceptible persons" and thereby "might well encompass material legitimately treating of sex."[476] The Court ruled that the test for obscenity substituted for the *Hicklin* rule by later American decisions "provides safeguards adequate to withstand the charge of constitutional infirmity."[477] According to the opinion, the substituted test, which the Court raised to the level of a constitutionally satisfactory test for obscenity, is "whether to the average person, applying contemporary community standards, *the dominant theme of the material taken as a whole* appeals to prurient interest."[478]

Since the only issues actually before the Court in both the *Roth* and *Alberts* cases involved the constitutional validity of the two statutes,[479] this part of the opinion might properly be classified as dictum. But it was not inadvertent or casual dictum. On the contrary, it was one of the key paragraphs of the entire opinion, summing up in short compass a constitutionally satisfactory test for distinguishing obscene material, which is not entitled to constitutional protection, from non-obscene material, which is entitled to such protection. Moreover, in the next paragraph the majority opinion explicitly pointed out that the trier of fact in both cases had judged "each item *as a whole* as it would affect the normal person."[480]

There is every reason to believe that this key paragraph is entitled to as much weight as any other portion of the *Roth-Alberts* majority opinion—perhaps even more—because none of the four Justices who refused to join in the opinion is likely to disagree with the requirement that material be judged as a whole. Mr. Justice Harlan, in his separate opinion, explicitly agreed to this requirement, saying, "I agree with the Court, of course, that the

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no apparent effort to consider the relevance of the passages to the book as a whole.

[475] Lockhart & McClure, *supra* note 1, at 344 n.321, lists 14 states with such statutes in effect in 1954.

[476] Roth v. United States, 354 U.S. 476, 489 (1957). (Emphasis added.)

[477] *Ibid.*

[478] *Ibid.* (Emphasis added.)

[479] See pp. 19–25 *supra.*

[480] 354 U.S. at 489. (Emphasis added.)

books must be judged *as a whole* and in relation to the normal adult reader."[481] And since Chief Justice Warren and Justices Black and Douglas would permit less censorship than the other six Justices[482] it seems improbable that they would permit material to be judged by isolated parts.

No Supreme Court opinion since *Roth-Alberts* has touched on the point, but state courts and lower federal courts have followed the constitutional requirement that material must be judged as a whole and by its dominant theme.[483] With one rare exception,[484] however, state legislatures have shown no inclination to amend their "containing" statutes to conform to the constitutional requirement. Indeed, since *Roth-Alberts* two state legislatures have amended their statutes but retained or re-enacted the "containing" provisions.[485] The greater responsiveness of courts to the new requirement is demonstrated by the Connecticut Supreme Court's reconciliation of the state's "containing" statute with the *Roth-Alberts* requirement. The Connecticut statute proscribes material "containing obscene, indecent or impure language, or any picture of . . . like character." Giving no explanation except a citation to the *Roth-Alberts* opinion, the court simply ruled that the statute "contemplates" that the material is to be considered as a whole.[486] Since the only alternative to this *tour de force* was to hold the statute unconstitutional, the Connecticut Supreme Court may have set a practical example for courts in the dozen states whose statutes still retain "containing" provisions.

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[481] *Id.* at 502. (Emphasis added.)

[482] See text accompanying notes 130, 137–40, 260–61 *supra.*

[483] Probably the most significant of these were the two excellent opinions in the *Grove* case, which rejected the Postmaster General's ban on the unexpurgated edition of *Lady Chatterley's Lover*. Both invoked the *Roth* requirement to overrule the Postmaster General, whose decision was based on the alleged obscenity of individual passages without concern for their relation to the theme of the novel. Grove Press, Inc. v. Christenberry, 175 F. Supp. 488, 501 (S.D.N.Y. 1959), *aff'd,* 276 F.2d 433, 437–39 (2d Cir. 1960). See also State v. Sul, 146 Conn. 78, 147 A.2d 686 (1958); People v. Bantam Books, 9 Misc. 2d 1064, 172 N.Y.S.2d 515 (Sup. Ct. 1957); State v. Kowan, 7 Ohio Op. 2d 81, 156 N.E.2d 170 (C.P. 1958).

[484] On June 13, less than two weeks before the *Roth* decision, the Michigan legislature replaced its "containing" statute with one simply prohibiting sale of an "obscene . . . book." Mich. Pub. Acts 1957, No. 265. In 1958 the statute was amended to incorporate explicitly the requirement that the book be considered as a whole. See MICH. STAT. ANN. § 28.575(2) (Supp. 1959). But the Michigan legislature apparently overlooked the "containing" provisions of another pre-1957 statute limiting the type of material that can be sold to "any minor child." See MICH. STAT. ANN. § 28.377 (1938).

[485] See ME. REV. STAT. ANN. ch. 134, § 24 (Supp. 1959), replacing ME. REV. STAT. ANN. ch. 134, § 24 (1954); R.I. GEN. LAWS ANN. ch. 31, § 11–31–1 (Supp. 1959), leaving the "containing" language unchanged in R.I. GEN. LAWS ANN. ch. 31, § 11–31–1 (1956).

[486] State v. Sul, 146 Conn. 78, 147 A.2d 686 (1958). The statute involved was CONN. GEN. STAT. § 53–243 (1958).

The Supreme Court has yet to speak of how it will apply the requirement that material must be judged by "the dominant theme of the material taken as a whole." We are not without some guidance, however, for in *Roth-Alberts* the Court simply lifted to the level of a constitutional requirement a concept that enlightened courts had already fairly well developed as a matter of statutory interpretation.[487] These decisions will be helpful in charting the probable meaning of the new constitutional requirement, but they do not settle one of its most critical issues.

In applying the requirement that material must be judged as a whole and by its dominant theme, courts have often spoken of the relevance of the objectionable parts to the dominant theme. If the objectionable parts are relevant to the dominant theme, courts ordinarily have found the material not obscene. But if the parts are irrelevant to the theme and independently obscene themselves, courts have usually found the material obscene.[488] The critical issue arises when it is claimed that the material is obscene because the objectionable parts, though *relevant* to the dominant theme, are not *necessary* to communicate the theme. For example, in *Commonwealth v. Isenstadt*, Lillian Smith's *Strange Fruit* was held obscene because, *in the court's judgment*, the author *could* have conveyed her "sincere message" without the objectionable parts of the book.[489] Other courts use a far more satisfactory test that does not put courts in the silly position of instructing authors how to write their books. They determine the relevancy of the objectionable parts to the theme of the material as a whole by the author's sincerity of purpose, a standard of relevancy that recognizes what is sometimes called "literary necessity"—the author's need to use whatever words and passages he feels will produce the *over-all effect* he hopes to achieve.[490] And here the testimony of the author himself or of expert witnesses is indispensable to a sound judgment of relevancy.[491]

Since *Roth-Alberts*, this critical issue has been considered in only one case—the case that arose out of the Postmaster General's efforts to cleanse the mails of the unexpurgated edition of D. H. Lawrence's *Lady Chatterley's Lover*. In that case Judge Bryan, in the federal district court, and Judge Clark, in the court of appeals, accepted "literary necessity" as the test for relevancy of the objectionable parts to the dominant theme of the novel considered as a whole.[492] Judge Clark explicitly rejected the notion that the objectionable parts must be *objectively necessary* to convey the "sincere message" of the material as a whole. He also displayed a thorough understanding of and appreciation for an author's sense of literary necessity:

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[487] Lockhart & McClure, *supra* note 1, at 345–47.

[488] *Id.* at 346.

[489] 318 Mass. 543, 557, 62 N.E.2d 840, 847 (1945): "[T]he matter which could be found objectionable is not necessary to convey any sincere message the book may contain." This is one of the cases cited by the Supreme Court as having adopted the requirement that material must be judged as a whole and by its dominant theme. See Roth v. United States, 354 U.S. 476, 489 n.26 (1957).

[490] See Lockhart & McClure, *supra* note 1, at 347 n.340.

[491] *Id.* at 346 n.339, 349–50.

> Obviously a writer can employ various means to achieve the effect he has in mind, and so *probably Lawrence could have omitted some of the passages found 'smutty' by the Postmaster General and yet have produced an effective work of literature. But clearly it would.... not have been the book he planned, because for what he had in mind his selection was most effective,* as the agitation and success of the book over the years has proven. In these sex descriptions showing how his aristocratic, but frustrated, lady achieved fulfillment and naturalness in her life, he also writes with power and indeed with a moving tenderness which is compelling, once our age-long inhibitions against sex revelations in print have been passed. . . .
>
> The same is true of the so-called four-letter words found particularly objectionable by the Postmaster General. These appear in the latter portion of the book in the mouth of the gamekeeper in his tutelage of lady in naturalness and are accepted by her as such. Again this could be taken as an object lesson at least in directness as compared to the smirk of much contemporary usage, which (perhaps strangely) does not seem to have offended our mailmen. In short, all these passages to which the Postmaster General takes exception—in bulk only a portion of the book—are subordinate, but highly useful elements to the development of the author's central purpose. And that is not prurient.[493]

Had the Department of Justice not decided against an appeal,[494] *Lady Chatterley's Lover* might have provided us with a definitive resolution of this critical issue. Nevertheless, it seems likely that the government's decision not to seek review in the Supreme Court represents the sound conclusion that the Court would probably accept Judge Clark's espousal of literary necessity as the test for determining the relevance of objectionable passages to the dominant theme of the work as a whole.

The particular concept of obscenity applied will, of course, affect the determination of the dominant theme of material. Under the concept of a constant obscenity, which is unconcerned with audience, the dominant theme is an inherent quality of the material itself, considered as a whole. But under the concept of a variable obscenity, the dominant theme of material considered as a whole varies according to the material's primary audience.[495] In this view, the dominant theme of *Lady Chatterley's Lover*, without appeal to prurient interest when the book is addressed to a primary audience of sexually mature adults, might well be found to appeal to the prurient interest of an audience of adolescents or other sexually immature persons when aimed primarily at them for the purpose of exploiting their craving for erotic fantasy.[496] Of course, under variable obscenity the material must still be considered as a whole, though the dominant theme of the material is determined by the nature of its appeal in the eyes of the primary audience and of the disseminator of the material to that audience.

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[492] Grove Press, Inc. v. Christenberry, 175 F. Supp. 488, 501–02 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433, 437–39 (2d Cir. 1960).

[493] Grove Press, Inc. v. Christenberry, 276 F.2d 433, 438–39 (2d Cir. 1960). (Emphasis added.)

[494] See N.Y. Times, June 3, 1960, p. 29, col. 6.

The constitutional requirement that obscenity be determined by the dominant theme of material considered as a whole, not by isolated passages, is applicable to motion pictures and plays as well as to books.[497] The requirement, designed to protect freedom of expression, applies to all means of communication.[498] A questioned scene in a motion picture may be just as relevant to its dominant theme as the challenged episodes and words in the unexpurgated edition of *Lady Chatterley's Lover*. Indeed, the need for this requirement is particularly acute with motion pictures because of the ease with which censors can and do order the deletion of particular scenes before exhibition of the film,[499] a technique not applicable to books which as a practical matter must be accepted or rejected as a whole.[500] This does not mean that the visual impact of a motion picture is to be disregarded, or that a motion picture can show sexual scenes with as much frankness as they may be described in books. But it does mean that scenes in motion pictures cannot be considered in isolation, apart from their relevance to the dominant theme of the motion picture considered as a whole.

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[495] See pp. 68–70, 73–88 *supra* for a consideration of the two concepts of obscenity.

[496] Judge Bryan recognized that the Grove Press Company had made "no attempt . . . to appeal to prurience or the prurient minded." Grove Press, Inc. v. Christenberry, 175 F. Supp. 488, 497 (S.D.N.Y. 1959).

[497] Columbia Pictures Corp. v. City of Chicago, 184 F. Supp. 817 (N.D. Ill. 1959); American Civil Liberties Union v. City of Chicago, 13 Ill. App. 2d 278, 141 N.E.2d 56 (1957). Unfortunately we have no Supreme Court decision on this precise point. *Kingsley Pictures* could have raised the point, for the censors had ordered three scenes deleted from "Lady Chatterley's Lover" as "immoral." See note 198 *supra* and accompanying text. But this issue dropped out of sight when the New York Regents' affirmance of the deletion was based, in part, on its conclusion that the "whole theme" of the picture was immoral because it presented adultery as a proper pattern of behavior, and the consideration of the case in the Supreme Court became focused on that issue. See text accompanying notes 210–13 *supra*.

[498] As indicated in note 497 *supra*, no Supreme Court opinion has ruled on the precise point of applying the dominant theme test to motion pictures. But the Court has repeatedly ruled that motion pictures are significant media for the communication of ideas entitled to freedom of expression protection. See, *e.g.*, Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959). And the Court has reversed motion picture censorship on the authority of the *Roth* and *Alberts* cases, in a case in which the apparent basis for the per curiam decision was the trial court's failure to follow the standard laid down in those cases. See Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957), considered in notes 163 & 168 *supra*. Nowhere has the Court intimated that a different standard would be applied to motion pictures than to books.

Sometimes courts and others have difficulty grasping the applicability of this constitutional requirement to magazines, books of short stories, and other collected works.[501] They overlook the fact that every magazine, every anthology, every collection of works always and necessarily has a dominant theme and purpose; none is ever thrown together at random, with no over-all theme or objective in view. Even the American Law Institute fell into this trap.[502] The absurdity of this position is demonstrated by a consideration of E. E. Cummings' *Collected Poems*. Cummings, of course, is one of the great poets of our time, and his *Collected Poems* is obviously designed to show the full range of his poetical works. Yet under the view that magazines, anthologies, and collected works need not be judged by their dominant themes nor considered as a whole, Cummings' *Collected Poems* might be censored or bowdlerized as obscene because it includes, for example, poems 134 and 250.[503] It leads to the absurdity of publishing volumes represented as the complete or collected works of Benjamin Franklin or Mark Twain that discreetly omit Franklin's *Letter to the Academy at Brussels* and Twain's *1601*.[504] We reject the notion that magazines, anthologies, and other collected works need not be judged as a whole and by their dominant themes. But in rejecting that absurd notion it is important to recognize that some pornographers may seek to disguise the pornographic nature of the dominant theme of the materials they assemble by the inclusion of some material that is clearly legitimate.[505] Here the concept of variable obscenity should be helpful in ascertaining the true dominant theme of the material despite the effort to disguise it.

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[499] See, *e.g.*, 38th ACLU Ann. Rep. 17 (1958). Unfortunately, exhibitors or producers, or both, appear to find it easier to yield to the censor's scissors than to resist them through an appeal to the courts.

[500] In Detroit, Michigan, however, one publisher before 1957 submitted manuscripts to the police censor bureau in advance of publication and deleted the words and passages the police found objectionable. See Lockhart & McClure, *supra* note 1, at 316.

[501] See, *e.g.*, Flying Eagle Publications, Inc. v. United States, 273 F.2d 799 (1st Cir. 1960) (six short stories in magazine *Manhunt* found obscene); *Report on Obscene Matter Sent Through the Mail to the House Committee on Post Office and Civil Service by the Subcommittee on Postal Operations*, 86th Cong., 1st Sess., 20–26 (1959) (two of four articles or stories in the publication *Big Table* held obscene by postal hearing examiner).

[502] See Model Penal Code, *op. cit. supra* note 314, at 40.

[503] No. 134 begins:
she being Brand-new; and you know consequently
a little stiff I was careful of her . . .
No. 250 begins:
may i feel said he
i'll squeal said she

[504] See Lockhart & McClure, *supra* note 1, at 337.

E. REDEEMING SOCIAL IMPORTANCE

The new constitutional requirement that material be judged for obscenity by the dominant theme of the material considered as a whole permits, but does not of itself require, consideration of the aesthetic or other social values of the material.[506] Long before the *Roth-Alberts* opinion, courts agreeing that material should be judged as a whole nevertheless disagreed over the relevance and importance of literary values. To some, literary values were irrelevant.[507] At the opposite extreme, others held obscenity statutes totally inapplicable to works of genuine literary value.[508] Most, however, found literary values relevant but gave them varying degrees of importance,[509] ranging from negligible[510] to almost overwhelming.[511]

Although in *Roth-Alberts* the Supreme Court cited with apparent approval two cases, one holding literary values irrelevant[512] and the other treating them as of negligible importance,[513] it seems clear that the Court cited them approvingly for other reasons.[514] In the same opinion, the Court emphasized that obscene material is "utterly without redeeming social importance,"[515] an observation hardly consistent with the notion that literary values are insignificant. And in its later decisions, the Court has found material of even minor redeeming social importance not obscene,[516] thus indicating that it probably will assign great, perhaps even overwhelming importance, to the aesthetic and other social values of material caught up in obscenity charges.[517]

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[505] This is likely to occur with some magazines, such as girlie magazines, unlikely with anthologies and collected works.

[506] Lockhart & McClure, *supra* note 1, at 347.

[507] See People v. Dial Press, Inc., 182 Misc. 416, 48 N.Y.S.2d 480 (Magis. Ct. 1944); People v. Friede, 133 Misc. 611, 233 N.Y. Supp. 565 (Magis. Ct. 1929); People v. Seltzer, 122 Misc. 329, 203 N.Y. Supp. 809 (Sup. Ct. 1924). See also People v. Wepplo, 78 Cal. App. 2d 959, 962, 178 P.2d 853, 856 (1947).

[508] See cases cited in Lockhart & McClure, *supra* note 1, at 347. See also St. Hubert Guild v. Quinn, 64 Misc. 336, 118 N.Y. Supp. 582 (Sup. Ct. 1909); People v. Gonzales, 107 N.Y.S.2d 968, 969 (Magis. Ct. 1951).

[509] See Lockhart & McClure, *supra* note 1, at 347. See also Times Film Corp. v. City of Chicago, 244 F.2d 432, 435 (7th Cir. 1957), *rev'd,* 355 U.S. 35 (1957); United States v. 4200 Copies Int'l Journal, 134 F. Supp. 490, 494 (E.D. Wash. 1955), *aff'd sub nom.* Mounce v. United States, 247 F.2d 148 (9th Cir. 1957), *rev'd,* 355 U.S. 180 (1957); American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 347, 121 N.E.2d 585, 592 (1954); People v. Holt (Ct. Gen. Sess. N.Y. 1922), reported in HOLT, JURGEN AND THE LAW 73 (1923); Commonwealth v. Mercur, 90 PITTS. L.J. 318 (Alleghany County Ct. 1942). For a discussion of the *Times Film* and *Mounce* cases, see notes 163, 164, & 168 *supra.*

[510] See Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945).

[511] See United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934).

[512] People v. Wepplo, 78 Cal. App. 2d 959, 178 P.2d 853 (1947), cited in 354 U.S. at 486 and apparently approved at 489.

If, however, the Court should move from the constant to the variable obscenity concept,[518] material of social value, perhaps even great social value, might properly be found obscene—but only in those circumstances in which the material lacks redeeming social importance *to its primary audience.*[519] Since the material is preserved for all others who may be capable of understanding and appreciating its value, there is no great loss to society in denying the material to a primary audience using it only as food for erotic fantasy. Indeed, variable obscenity might well lead to a greater total measure of freedom for material of social value than constant obscenity would allow. For variable obscenity permits emphasis upon the value of material for its primary audience. Under the constant obscenity concept, courts are faced with the choice of finding the material before them either obscene or not obscene for everyone in all circumstances. Confronted with that stark choice, a court might well tip the scales in favor of obscenity when, under the variable obscenity concept, it would find the same material not obscene for a particular primary audience. In the *Kinsey* case[520] Judge Palmieri escaped from the constant obscenity straitjacket by way of the variable obscenity concept, which permitted him to find that photographs, indisputably hard-core pornography, were not obscene when addressed solely to the Kinsey Institute. Similarly, the concept of obscenity held and applied by the first court to be confronted hereafter with Henry Miller's scabrous novels[521] will, we believe, greatly influence the court's decision on their obscenity; if the novels are discreetly handled and clearly directed to a primary audience of sexually mature and sophisticated adults, the variable obscenity concept is more likely to produce a ruling favorable to the books than is the constant obscenity concept.[522]

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[513] Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945), cited in 354 U.S. at 489 n.26.

[514] The Court cited these and other cases only because they rejected the "partly obscene" and "susceptible persons" features of the old *Hicklin* rule. See text accompanying notes 281–300 *supra.*

[515] 354 U.S. at 484. The Court also emphasized the great importance of protecting freedom of speech and press for discussion of all matters of public concern, and included sex as one of the vital matters of such concern. *Id.* at 487–88.

[516] See notes 163, 165, 166 & 168 *supra* and accompanying text. None of the materials in these per curiam decisions had great social value, yet in three of the four cases the Court held the material not obscene.

[517] See text accompanying notes 332–34 *supra.*

[518] See pp. 68–70. 73–88 *supra* for an analysis of these two concpets.

[519] See text following note 439 *supra.* This would happen where socially valuable material, not obscene when addressed to a primary audience of sexually mature adults, is *treated* by both its disseminator and its primary audience of the sexually immature *as if it were* hard-core pornography.

[520] United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957). See Comment, 34 IND. L.J. 426 (1959).

Yet, whichever of the two competing concepts of obscenity ultimately prevails, we are convinced that material of redeeming social importance is not obscene and is entitled to constitutional protection—at least in those circumstances in which the material has social value for its primary audience.[523] This much seems very clear at the present stage in the development of constitutional standards governing obscenity censorship. But the means for determining whether material has social value and, if so, the weight to be accorded it, are not yet at all clear. And these are crucial problems, for it is easier to *say* that we will respect and protect material of redeeming social importance than it is to do so in practice. This is particularly true of works of art, because many people—including some police and prosecuting officers, and sometimes judges too—do not understand or appreciate them. These people neither know nor understand how the fine arts—including drama, fiction, poetry, dancing, and even music—are vehicles for the communication of ideas.[524] Consequently, some way must be found to assure that in all obscenity cases the value of the material is first of all considered and then given its proper weight in arriving at a decision on the obscenity of material.

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[521] See text accompanying notes 413–15 *supra*.

[522] We have a hunch that the variable obscenity concept, with its strong emphasis upon the particular audiences of material, would help judges and other triers of fact to repress their own personal reactions to material. For example, if the postal hearing examiner who found the far-out beatnik publication, *The Big Table*, obscene had considered its actual primary audience, he would have been better able to suppress his personal reactions to the publication and the decision would have gone the other way. The decision was vacated in Big Table, Inc. v. Schroeder, 186 F. Supp. 254 (N.D. Ill. 1960). For the examiner's opinion, see *Report, supra* note 174, at 21–26.

[523] While the concept of the primary audience has its principal use under variable obscenity, we believe that even under constant obscenity the Court must and will consider the social value of material to its primary audience in determining whether it is entitled to constitutional protection. Of course when it does so, it will be moving to the brink of variable obscenity.

[524] See Lockhart & McClure, *supra* note 1, at 369–71; FERGUSON, MUSIC AS METAPHOR (1960). In San Francisco recently, the police ordered the proprietor of an art gallery to remove a painting of a nude from his display window. 39th ACLU ANN. REP. 17 (1959).

At one time, not many years ago, a number of courts refused to admit evidence of the value of material alleged to be obscene;[525] and some that admitted such evidence refused to give it any weight.[526] Most courts, however, readily admitted and seriously considered evidence of the value of the material before them. Recognizing their limitations, these courts welcomed the assistance that competent critics and expert witnesses could give them.[527] It seems to us that the admission and thoughtful consideration of such evidence are essential to an intelligent appraisal of material alleged to be obscene, for without such evidence courts are forced to assume the role of critic and expert in many fields of human endeavor—a role that few courts, if any, are competent to play.[528] Although in 1954 we suggested that admission of such evidence was "probably not a constitutional requirement,"[529] we are now convinced that this evidence is of such crucial importance that its admission ought to be raised to the level of a constitutional requirement. Indeed, without such evidence in the record, appellate courts will often find it impossible to review intelligently the obscenity decisions brought before them.[530]

But the admission of critical and expert evidence cuts both ways. If such evidence is, as we believe, indispensable to an intelligent appraisal of much material sought to be censored as obscene, in many cases it may also be indispensable to an intelligent penetration of the disguise of pornographic material masquerading as legitimate fare. For example, a pseudo-physical-culture magazine was published in Chicago a few years ago. Although not a Charles Atlas magazine, it would have appeared to the normal heterosexual male only as a rather bizarre magazine because of the unusual clothing worn by the muscular men pictured in its photographs and the peculiar settings and props included in the photographs. Analyzed by a psychologist or psychiatrist, however, the magazine took on an entirely different character; it was then seen for what it really was—a magazine for male homosexuals to whom the clothing, settings, and props had symbolic meaning.[531] The admission and consideration of critical and expert evidence are just as essential to an intelligent appraisal of the material in cases of this type as in cases involving material of aesthetic or other legitimate social values.

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[525] See cases cited in Lockhart & McClure, *supra* note 1, at 348.

[526] In United States v. Two Obscene Books, 92 F. Supp. 934 (N.D. Cal. 1950), the district court refused to issue a commission for taking the depositions of literary critics on Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn*. See Recent Case, 35 MINN. L. REV. 326 (1951). When evidence of their value and literary stature was later entered in the record, both the district court and the court of appeals refused to give it any weight. United States v. Two Obscene Books, 99 F. Supp. 760 (N.D. Cal. 1951), *aff'd sub nom.* Besig v. United States, 208 F.2d 142 (9th Cir. 1953). For a critical appraisal of these works, see Krim, *The Netherworld of Henry Miller*, 57 Commonweal, Oct. 24, 1952, p. 68.

[527] Lockhart & McClure, *supra* note 1, at 348.

[528] *Id.* at 393. See also MODEL PENAL CODE, *op. cit. supra* note 314, at § 207.10(2)(c) & Comment, pp. 40–43.

[529] Lockhart & McClure, *supra* note 1, at 393.

[530] For consideration of judicial review in obscenity cases, see pp. 114–20 *infra*.

Although we are convinced that the admission of evidence of the social value of material alleged to be obscene—or of the absence of value—deserves to be raised to the level of a constitutional requirement, we are not sanguine about it. So far, only one Justice—Mr. Justice Frankfurter—has indicated that he would approve of such a constitutional requirement;[532] another—Mr. Justice Harlan—has expressed disapproval.[533] It may be true that, if the concept of a constant obscenity is followed and if that concept is limited to hard-core pornography, there will not often be occasion to call upon competent critics and experts for assistance.[534] But if the Supreme Court, adhering to the constant obscenity concept, should go beyond hard-core pornography in categorizing the obscene,[535] or if the Court should move from the constant to the variable obscenity concept,[536] it is hard to see how material could be intelligently appraised for obscenity or how an appellate court could intelligently review obscenity decisions without the evidence of competent critics and experts. We think that the admission of such evidence, when proffered by either side in an obscenity case, should be made a constitutional requirement.

F. THE END OF IDEOLOGICAL OBSCENITY

Before *Kingsley Pictures* some courts found material obscene because it challenged current moral standards.[537] But censorship of such "critical or ideological obscenity," simply for the ideas it contained, flew squarely in the face of the very reason for guaranteeing freedom of expression—to keep our democratic society free to perfect its own standards of conduct and belief through the heat of unrepressed controversy and debate.[538] In 1959, *Kingsley Pictures*[539] put an end to censorship for ideological obscenity when the Court ruled that the constitutional "guarantee of the freedom to advocate ideas" protects the right to advocate that adultery may be proper in some circumstances. Despite other differences reflected by six opinions,[540] eight of the Justices concurred in this position and the ninth expressed no dissent.[541] The opinions seem to indicate clearly that the Supreme Court will not tolerate censorship of ideas, however repugnant they may be to currently accepted moral standards.

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[531] We are indebted to Dr. Starke R. Hathaway, Professor of Clinical Psychology, University of Minnesota, for this information and these insights.

[532] See Smith v. California, 361 U.S. 147, 164 (1959).

[533] See *id.* at 171–72. None of the other Justices has indicated any position on this issue.

[534] Yet even here, as in the case of the pseudo-physical-culture magazine, such evidence would occasionally be indispensible. See text accompanying note 531 *supra.*

[535] See text accompanying notes 410–15 *supra.*

[536] See text accompanying notes 379–83 *supra.*

[537] See cases cited in Lockhart & McClure, *supra* note 1, at 333–35.

The main thrust of the opinion in *Kingsley Pictures* is a strong declaration of the constitutional right to advocate unconventional ideas and behavior "immoral" by current standards, and to do so in effective and dramatic ways. In his opinion for a majority of five,[542] Mr. Justice Stewart emphasized that censorship of the motion picture *Lady Chatterley's Lover*—not for obscenity but for alluring portrayal of adultery as proper behavior[543]—"struck at the very heart of constitutionally protected liberty."[544] For the "First Amendment's basic guarantee is of freedom to advocate ideas."[545] It made no difference that the film "attractively portrays" a relationship contrary to moral standards, religious precepts and the legal code,[546] because the constitutional guarantee—

> is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.[547]

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[538] *Id.* at 374–76.

[539] Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959).

[540] For a brief summary of the positions of the Justices in the six opinions, see text accompanying notes 211–21 *supra.*

[541] Only Mr. Justice Clark withheld any expression of views on the ideological obscenity problem. He preferred to base reversal of the censorship on the ground that the statute was unconstitutionally vague. 360 U.S. at 699–702.

[542] Justices Black, Douglas, Brennan and Mr. Chief Justice Warren concurred in the Stewart opinion. Justices Black and Douglas wrote separate concurring opinions on other points, but both expressly joined in the Stewart opinion. *Id.* at 690, 697.

[543] Mr. Justice Stewart's opinion noted that the New York Court of Appeals opinions had "explicitly rejected any notion that the film is obscene" and had sustained the censorship because it found that the picture " 'alluringly portrays adultery as proper behavior.' " *Id.* at 686–87.

[544] *Id.* at 688.

[545] *Ibid.*

[546] *Id.* at 688–89.

[547] *Id.* at 689.

While Justices Harlan, Frankfurter and Whittaker did not concur in the Stewart opinion because they interpreted the New York Court of Appeals decision to rest in part on "actual scenes of a suggestive and obscene nature,"[548] they did not disagree with the basic constitutional ruling of the majority. On the contrary, writing for the three, Mr. Justice Harlan stated:

> Granting that the abstract public discussion or advocacy of adultery, unaccompanied by obscene portrayal or actual incitement to such behavior, may not constitutionally be proscribed by the State, I do not read those opinions [of the Court of Appeals] to hold that the statute on its face undertakes any such proscription.[549]

Are there any limits to this strongly stated position that material challenging current moral standards and advocating conduct inconsistent with those standards is constitutionally protected freedom of expression? Both the Stewart and Harlan opinions suggest that there may be. In the majority opinion, Mr. Justice Stewart invoked the rationale of Mr. Justice Brandeis' classic exposition of the "clear and present danger" concept in *Whitney v. California*.[550] He agreed with Brandeis that free speech protects advocacy of conduct forbidden by law so long as "the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon;" absent such incitement or immediate danger, the deterrent must be left to "education and punishment for violation of the law, not abridgment of the rights of free speech."[551] Similarly, Mr. Justice Harlan's opinion recognized the constitutional right to "*abstract* public discussion or advocacy of adultery," but only when "unaccompanied by obscene portrayal or actual incitement to such behavior."[552]

The *Kingsley Pictures* opinions thus suggest two possible limitations on constitutional protection for "ideological obscenity." Conceivably, a book may be found obscene, quite apart from the objectionable ideas it asserts. Nothing in *Kingsley Pictures* suggests that constitutional protection for ideas immunizes otherwise obscene material from censorship. On the contrary, Mr. Justice Harlan expressly limited his recognition of constitutional protection to

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[548] *Id.* at 706. This dispute over the interpretation of the court of appeals' opinions is considered in detail in 44 MINN. L. REV. 334 (1959).

[549] 360 U.S. at 705–06. Though finding that the New York decision was based on "espousal of sexually immoral acts *plus* actual scenes of a suggestive and obscene nature," *id.* at 706, Justices Harlan, Frankfurter, and Whittaker found the film "lacking in anything that could properly be termed obscene" and therefore concurred in striking down the censorship. *Id.* at 708.

[550] 274 U.S. 357 (1927).

[551] Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 689 (1959).

[552] *Id.* at 705. (Emphasis added.)

"*abstract* public discussion or advocacy of adultery, *unaccompanied by obscene portrayal.*"[553] And Mr. Justice Stewart took care to make clear that the Court's decision was based upon its conclusion that the New York Court of Appeals decision had "rejected any notion that the film is obscene"[554] and had approved denial of the license because the film "approvingly portrays an adulterous relationship, *quite without reference to the manner of its portrayal.*"[555] Such care in limiting their opinions suggests that the Justices recognized they would be faced with a very different problem if the claim were made that the manner of portrayal was itself obscene. But in such a case the ideological content of the material in question could, in some circumstances, immunize it from obscenity censorship because of the constitutional requirement that obscenity be determined by the dominant theme of the material considered as a whole.

The other possible limitation on constitutional protection for the expression of ideas advocating deviation from moral standards is the suggestion in both the Stewart and Harlan opinions that advocacy amounting to incitement to illegal action would not be protected.[556] Since advocacy of immoral conduct is not "obscene" within constitutional requirements, such advocacy would be subject to the clear and present danger test commonly used by the Court in other freedom of expression cases.[557] We doubt that this limitation will provide a basis for harmful interference with the serious expression of unconventional ideas relating to sexual conduct. What is important to our society is freedom to advocate unpopular and unconventional ideas, not freedom to inflame or incite persons to violate the law without first changing it. Further, we doubt that advocacy of unconventional moral conduct, unaccompanied by portrayal that satisfies the constitutional requirements for censorable obscenity, is likely to be found to create a clear and present danger of illegal conduct.[558]

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[553] *Ibid.* (Emphasis added.)

[554] *Id.* at 686.

[555] *Id.* at 688. (Emphasis added.)

[556] Mr. Justice Stewart's opinion not only used the Brandeis quotation from *Whitney*, quoted in the text accompanying note 551 *supra*, but expressly made the point that New York did not suggest "that the film would itself operate as an incitement to illegal action." *Id.* at 688. The brief statement in Mr. Justice Harlan's opinion, quoted in the text accompanying note 549 *supra*, appeared to accept this implied limitation on the constitutional protection for ideas.

[557] See text accompanying note 550 *supra*. For an analysis of the "clear and present danger" test, see Lockhart & McClure, *supra* note 1, at 363–68. Obscenity is not subject to this test because of the decision in *Roth-Alberts* that freedom of expression guarantees do not apply to obscenity, but that decision is inapplicable to advocacy that is not "obscene."

[558] See our earlier analysis of this point in Lockhart & McClure, *supra* note 1, at 376.

The impact of *Kingsley Pictures* upon the administration of censorship laws may not be dramatic. Seldom does a decision sustaining censorship admittedly rest on ideological obscenity standing alone.[559] But before 1959, when *Kingsley Pictures* was decided, the objectionable nature of some ideas played a prominent role in many obscenity decisions.[560] *Kingsley Pictures* should put an end to this element in obscenity censorship, as apparently it is doing.[561] Henceforth, obscenity censorship must be based upon a finding of obscenity that satisfies constitutional requirements, not upon a fuzzy blending of borderline obscenity with objectionable ideas.[562]

G. CRIMINAL INTENT

In the Supreme Court's latest obscenity ruling, *Smith v. California*,[563] all but two of the Justices agreed that some undetermined degree of scienter is a constitutional prerequisite to criminal prosecution for the sale of obscene literature. In reversing the conviction of a bookstore proprieter for possession of an obscene book, Mr. Justice Brennan, writing for a majority of the Court,[564] ruled that the state cannot constitutionally eliminate "all mental elements from the crime,"[565] as the lower California court had done.[566] Justices Douglas and Frankfurter also indicated their agreement that scienter in some form is constitutionally required for an obscenity conviction,[567] and even the two Justices who withheld their explicit approval did not take a negative position. Mr. Justice Black would permit no censorship at all,[568] and Mr. Justice Harlan did not reach the question, though he said he was "unconvinced."[569]

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[559] See *id.* at 333–34.

[560] See *id.* at 334 n.268.

[561] See, *e.g.*, Grove Press, Inc. v. Christenberry, 175 F. Supp. 488, 501 (S.D.N.Y. 1959), where Judge Bryan, on the authority of *Kingsley Pictures*, overruled the Postmaster General's ban on *Lady Chatterley's Lover* and threw out as immaterial any consideration of conflict between the ideas in the book and the accepted moral code. In affirming this ruling the court of appeals, in an opinion by Judge Charles Clark, gave no consideration whatever to the unconventional nature of the ideas advanced as a possible basis for sustaining the censorship. See Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960). For similar recent recognition of the impropriety of basing censorship on advocacy of unconventional conduct, see Excelsior Pictures Corp. v. City of Chicago, 182 F. Supp. 400, 403 (N.D. Ill. 1960) (film advocating nudism as a way of life); *cf.* State v. Rothschild, 190 Ohio App. 101, 163 N.E.2d 907 (1958).

[562] See text accompanying notes 198–207 *supra.*

[563] 361 U.S. 147 (1959), described in more detail in text accompanying notes 228–61 *supra.*

[564] The majority consisted of Chief Justice Warren, and Justices Brennan, Clark, Whittaker and Stewart.

[565] *Id.* at 155.

[566] *Id.* at 149.

[567] Recognizing that his views in opposition to obscenity censorship were in the minority, Mr. Justice Douglas gave a brief blessing to the scienter holding by his comment: "I see no harm, and perhaps some good, in the rule fashioned by the Court which requires a showing of scienter." *Id.* at 169. Mr. Justice Frankfurter was dissatisfied with the vagueness of the majority's ruling on scienter. See text accompanying notes 580–83 *infra.*

The Court's majority believed that a scienter requirement was necessary to prevent obscenity statutes from interfering with freedom of expression by restricting, in their practical operation, the dissemination of books that are not obscene. To penalize booksellers "even though they had not the slightest notice of the character of the books they sell" would, the Court reasoned, impose a severe limitation on the public's access to constitutionally protected material.[570] To the extent that a strict-liability obscenity statute is effective,[571] it would tend to cause a bookseller to restrict his sales to books he has inspected. The Court also reasoned that "timidity in the face of absolute criminal liability" would lead booksellers to "self-censorship, compelled by the State . . . affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."[572] The latter reasoning appears to suggest that the Court is concerned with more than a mere hesitation to sell without knowledge of contents. The expressions "*timidity* in the face of absolute criminal liability" and "*self-censorship*" both suggest hesitation to take a chance on handling borderline books whose contents are known but whose character as "obscene" or "not obscene" cannot be known in advance of a court ruling.

There is plenty of evidence to support the Court's fear that booksellers prefer self-censorship to the risk of prosecution under a strict statute, at least where there is any substantial community pressure aimed at suppression of "objectionable" books.[573] Retail distributors of paper-bound books, most of them not professional booksellers at all, are likely to remove from their shelves any book objected to by militant censorship groups, rather than examine their contents or—even knowing the contents—attempt to reach a considered judgment on whether they are "obscene" under evolving constitutional standards. Mr. Justice Douglas appears to have had such considerations in mind when, briefly approving the scienter requirement, he stated: "What the Court does today may possibly provide some small degree of safeguard to booksellers by making those who patrol bookstalls proceed less highhandedly than has been their custom."[574]

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[568] *Id.* at 155–60.

[569] *Id.* at 170.

[570] *Id.* at 152.

[571] The Court recognized doubts expressed by a commentator as to the effectiveness of strict criminal liability statutes in promoting caution. See *id.* at 153 n.8.

[572] *Id.* at 154.

[573] See text accompanying notes 24–36 *supra.*

In the majority opinion Mr. Justice Brennan made no effort to determine just "what sort of mental element" is required to satisfy the constitutional requirement.[575] He recognized that proof of actual perusal of a book was not necessary to prove awareness of its contents, and that circumstances could justify an inference of such awareness.[576] But he explicitly left open two questions: (1) Are there circumstances under which a state could require a bookseller to investigate further or place upon him the burden of explaining why he did not do so?[577] (2) Is an honest mistake as to whether the known contents of a book constituted obscenity an excuse?[578] Not being faced with a case raising such questions, he limited the majority opinion to the broad ruling that a criminal obscenity statute cannot eliminate "all mental elements from the crime."[579] But in a separate concurring opinion Mr. Justice Frankfurter protested this failure "to give some indication of the scope and quality of scienter that is required."[580] He was not satisfied with the majority's "unguiding, vague standard for establishing 'awareness' by the bookseller of the contents of a challenged book . . . ."[581] Apparently, he would have preferred that the Court indicate, at the very least, that "a bookseller may, of course, be well aware of the nature of a book and its appeal without having opened its cover, or, in any true sense, having knowledge of the book."[582] His concern was that the majority opinion had not made it clear that "the Court's decision, in its practical effect, is not intended to nullify the conceded power of the State to prohibit booksellers from trafficking in obscene literature."[583] We are not persuaded by Mr. Justice Frankfurter's reason for desiring some advance guidance as to what the Court might consider necessary to satisfy the scienter requirement of "awareness." In view of the widespread pressures for censorship,[584] there is little danger that the *Smith* decision will deter obscenity prosecutions where there is a reasonable basis for contending that a bookseller was aware of the nature of the challenged book. We can foresee no dearth of cases through which a sound concept of scienter may be developed in the context of concrete situations that will point up the true nature of the problem.

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[574] Smith v. California, 361 U.S. 147, 169 (1959).

[575] *Id.* at 154.

[576] *Ibid.* This suggestion was followed in People v. Schenkman, 195 N.Y.S.2d 570 (Ct. Spec. Sess. 1960), where the court inferred knowledge of the pornographic nature of material from the played-up five-dollar price for small paper-bound books with suggestive blurbs on the covers. *Cf.* United States v. Hochman, 175 F. Supp. 881 (E.D. Wis.), *aff'd,* 277 F.2d 631 (7th Cir.), *cert. denied,* 364 U.S. 837 (1960); Alexander v. United States, 271 F.2d 140 (8th Cir. 1959).

[577] Smith v. California, 361 U.S. 147, 154 (1959).

[578] *Ibid.*

[579] *Id.* at 155.

[580] *Id.* at 162.

[581] *Id.* at 164.

[582] *Ibid.*

[583] *Id.* at 162.

The other question left open by the Court is whether a bookseller's honest but mistaken belief that the known contents of a book are not obscene constitutes a defense.[585] The strong public interest in encouraging dissemination of non-obscene literature, which motivated the imposition of the scienter requirement, dictates an affirmative answer. In the case of blatantly hard-core pornography, such a defense would obviously be rejected as untrue. But the character of many books is such that it will be impossible, under evolving constitutional standards, to determine in advance of a judicial ruling whether a book is "obscene," even with the best legal advice. To require that a bookseller sell such a book at his peril would constitute a substantial deterrent to the sale of significant literature that is not obscene, for it would result in the very "self-censorship . . . privately administered" and "timidity in the face of absolute criminal liability" that the Court sought to avoid by imposing the scienter requirement.[586]

If there were no way to control the sale of obscene literature except to prove that the bookseller knew, before adjudication, that the literature was "obscene" under the constitutional standard, the Court would be faced with a difficult dilemma. To rule that a bookseller's honest mistake as to obscenity is a defense would seriously hamper effective state control over the distribution of obscene literature, other than the obviously hard-core pornography about which no bookseller could honestly claim mistake. On the other hand, to rule that an honest mistake is not a defense would hamper the distribution of constitutionally protected literature by placing the risk of mistake on the bookseller. But the Court need not choose between these two undesirable alternatives, for an alternative solution is readily at hand that adequately protects both interests.

Adjudications that a book is obscene can readily be obtained under statutes authorizing declaratory judgment or book libel proceedings, or under the growing volume of statutes authorizing injunctions against the sale of particular obscene material.[587] After such an adjudication, or after a successful prosecution which has resulted in a finding that a book is obscene, each bookseller within the state could readily be given notice of the decision, which would constitute adequate proof of scienter. In this manner, the state's interest in effective control over distribution of obscene literature could be protected without subjecting booksellers to the hazard of selling at their peril when they have no dependable way to ascertain whether a particular book may be held obscene. In view of the availability of this practical means of establishing scienter, we believe the Court should rule that the scienter requirement has not been met if, absent such adjudication and notice, the seller honestly believed that the book was not obscene.[588]

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[584] See text accompanying notes 7—43 *supra*.

[585] This was held not to be a valid defense in a recent municipal court decision. See City of Cincinnati v. King, 168 N.E.2d 633 (Cincinnati Munic. Ct. 1960).

[586] See text accompanying note 572 *supra*.

Of course the trial court need not accept as true the seller's profession of belief that the book is not obscene. In any case in which the seller had good reason to know that the book was obscene, the trial court can conclude that he did, in fact, believe it to be obscene. For example, after several publications of the same nature as the one in question, marketed in the same manner, have been found obscene in well-publicized prosecutions or book proceedings, a trial court would be justified in concluding that when a seller is chargeable with knowledge of the contents of the publication he must also be charged with knowledge of its obscene nature.

One remaining question is whether the bookseller's *honest* belief that the material he sells is not obscene must also be *reasonable* in order to avoid a finding that the scienter requirement has been satisfied. We doubt that a reasonable belief should be required. In view of the uncompromising certainty with which some courts have asserted that anyone can recognize obscenity,[589] we fear that too many courts will automatically find unreasonable any belief contrary to their conclusion that a book is obscene. If booksellers are subject to such a risk, they are likely to take off the market those books which they anticipate may give rise to a reasonable difference of opinion regarding obscenity. Yet these are the very books which should be the subject of a judicial determination of obscenity, without prior private suppression. Booksellers, understandably, are more interested in protecting themselves from criminal prosecution than in vindicating the public interest in freedom of expression.

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[587] For examples of statutes authorizing declaratory judgment or book libel proceedings, see, *e.g.*, Fla. Stat. Ann. § 847.01(c) (Supp. 1959); Mass. Ann. Laws ch. 272, § 28C (1956); Mich. Stat. Ann. § 27.1410(1) (Supp. 1959); Wis. Stat. Ann. § 269.565 (Supp. 1960) See proposals relating to such a statute in Lockhart & McClure, *Obscenity in the Courts*, 20 Law & Contemp. Prob. 587, 607 (1955); Kilpatrick, The Smut Peddlers 270–72 (1960).

For examples of statutes authorizing injunctions, see, *e.g.*, Ga. Code Ann. § 26–6306(a) (Supp. 1958); Idaho Code Ann. § 18–1510 (Supp. 1959); Mich. Stat. Ann. § 27.1410(1) (Supp. 1959); Ohio Rev. Code Ann. § 2905.343 (Page Supp. 1960); Pa. Stat. Ann. tit. 18, § 3832.1 (Supp. 1959); R. I. Ge.n Laws Ann. ch. 11, § 31–13 (Supp. 1959). The New York statute authorizing such an injunction was sustained in Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). See text accompanying notes 141–47 *supra*.

[588] But compare Professor Kalven's suggestion that such a ruling would, in effect, revive by way of the scienter requirement the previously rejected vagueness objection to obscenity legislation. See Kalven, *supra* note 5, at 37.

[589] See Lockhart & McClure, *supra* note 1, at 348.

The foregoing analysis is equally applicable whether the Court follows the constant or the variable obscenity concepts. For whatever the concept of obscenity, there will be doubtful cases in which no bookseller could predict with any confidence whether a particular book may be found obscene or entitled to constitutional protection. But the variable obscenity concept would make it easier for the state to satisfy the scienter requirement, for when a book is marketed in a manner that appeals to the erotic fantasies of a sexually immature primary audience, the bookseller can scarcely deny that he knew the true nature of the appeal.

While this discussion has been centered on books and booksellers, the scienter requirement is equally applicable to other types of material. All of the considerations applicable to books are equally applicable to magazines. But the requirement of scienter could be given a more limited application in prosecuting motion picture exhibitors, for exhibitors can reasonably be required to know the content of a motion picture before exhibiting it. In contrast to the impracticability of expecting a bookseller to ascertain the contents of all his books, it is a simple matter to preview a motion picture before exhibition, and in many theaters this is the usual practice. On the other hand, knowledge of the content of a motion picture will not enable an exhibitor to forecast a court decision in debatable cases. To require him to do so at his peril would make him a self-censor no less than it would the bookseller, and thereby tend to deprive the public of significant motion pictures that a court might well find constitutionally protected. In this respect, the considerations raised by application of the scienter requirement to booksellers are equally applicable to motion picture exhibitors, who have no greater liking for criminal prosecution.

H. CONTEMPORARY COMMUNITY STANDARDS

Since June 24, 1957, the Supreme Court has disappointed the proponents of censorship by making it clear that the decisions rendered on that date[590] did not proclaim a field day for censorship of obscenity, but in fact placed very tight limits on what may constitutionally be censored as obscene.[591] Censorship proponents have now pinned their hopes on the Court's statement in the *Roth-Alberts* opinion that material may constitutionally be judged for obscenity by the application of "contemporary community standards."[592] Assuming that this phrase referred to the contemporary standards of state or local communities,[593] the Post Office and Justice Departments secured federal legislation authorizing obscenity prosecutions at any place through which mail passes or at the place of its receipt,[594] in the hope that convictions could be more easily obtained in the hinterlands than in some of the more sophisticated metropolitan communities where material is mailed.[595] At trials in more straight-laced communities, the government could make particularly effective use of such trial tactics as refusing to consent to waivers of jury trials;[596] and then, having insisted on jury trials, it could peremptorily challenge the most literate and best-educated jurors.[597] If "contemporary community standards" has reference to the standards of state or local communities, and if those standards are to be applied by a jury, then these tactics will enable the government to secure convictions which heretofore would have been difficult or impossible to obtain.

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[590] See pp. 18–32 *supra*, for accounts of the decisions of that date.

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[591] See pp. 32–36, 39–42, 58–60 *supra.*

[592] 354 U.S. at 489. The full text of the test for obscenity approved in that opinion was "whether to the average person, *applying contemporary community standards,* the dominant theme of the material taken as a whole appeals to prurient interest." *Ibid.* (Emphasis added.)

[593] Some courts and other persons jumped to this conclusion. See United States v. Frew, 187 F. Supp. 500, 506 (E.D. Mich. 1960); Four Star Publications, Inc. v. Erbe, 181 F. Supp. 483, 484–85 (D. Ia. 1960); People v. Smith, 161 Cal. App. 2d 860, 862, 327 P.2d 636, 638, *rev'd sub nom.* Smith v. California, 361 U.S. 147 (1959); People v. Brooklyn News Co., 12 Misc. 2d 768, 771–72, 174 N.Y.S.2d 813, 817–18 (County Ct. 1958); *Hearings, supra* note 38, at 63–66.

[594] See text accompanying notes 175–179 *supra.*

[595] And they did not overlook the fact that a trial far from the defendant's home and place of business would make it inconvenient for him to defend himself. See note 178 *supra.* Of this practice, Mr. Justice Frankfurter said in United States v. Johnson, 323 U.S. 273 (1944):

> Aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him, the Framers wrote into the Constitution that "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . ." Article III, § 2, cl. 3. As though to underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed." Sixth Amendment. By utilizing the doctrine of a continuing offense, Congress may, to be sure, provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates. Thus, an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district. *Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.*

Id. at 275. (Emphasis added.) *Cf.* Hyde v. United States, 225 U.S. 347, 386–87 (1912) (Holmes, J., dissenting).

[596] FED. R. CRIM. P. 23. Defendants in obscenity cases almost invariably try to avoid trial by jury. Bromberg, *supra* note 341, at 418.

But we doubt the validity of the assumption that the phrase "contemporary community standards" refers to the standards of state or local communities. The idea embodied in that phrase seems to have originated with Judge Learned Hand's celebrated opinion in *United States v. Kennerley*.[598] In protesting the old *Hicklin* rule, which he then felt obligated to follow, Judge Hand said:

> Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition, such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which *the community may have arrived here and now?* . . . To put thought in leash to the *average conscience of the time* is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy. . . . Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent.[599]

And it seems clear that in this passage Judge Hand was not referring to the standards of state or local communities but rather to the standards of society as a whole.

Another reason for believing that the Court in the *Roth-Alberts* opinion did not commit itself to the standards of state or local communities lies in the Court's approval of the 13 cases it cited as having adopted a constitutionally satisfactory test for obscenity.[600] Although two of the cases spoke of local standards at the time and place of each alleged offense, a third emphasized the necessity for a uniform national standard, and the concurring opinion of Judge Jerome Frank in a fourth case referred to the attitude of the

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[597] This, we are informed by defense counsel, happened in the trial of Alexander v. United States, 271 F.2d 140 (8th Cir. 1959), after an assistant United States attorney refused to consent to Alexander's request for waiver of a jury trial. See also McClure, Book Review, 59 COLUM. L. REV. 387. 404 (1959).

[598] 209 Fed. 119 (S.D.N.Y. 1913).

[599] *Id.* at 121. (Emphasis added.)

[600] See text accompanying notes 282–300 *supra*, for an analysis of the cases.

American community in general.[601] The opinions in the remaining nine cases were noncommittal on the issue.

For these reasons we believe that the Supreme Court did not, as some of the proponents of censorship hopefully thought, approve of the application of state or local community standards in obscenity cases. Indeed, in one of its per curiam decisions after the *Roth-Alberts* opinion the Court indicated that it would not tolerate the application of restrictive local standards in obscenity censorship. In *Times Film Corp. v. City of Chicago*[602] the Court reversed a United States court of appeals decision upholding Chicago's censorship of the motion picture *The Game of Love*; and it did so upon the ground that the film was not constitutionally obscene.[603] Had the Court approved of the application of local standards in obscenity cases it would not so summarily have substituted its judgment of Chicago standards for the judgment of the city censors and federal courts in that part of the country.[604] We are confident that, when the Supreme Court is clearly presented with the issue, the Court will resolve the issue against the application of state and local community standards.

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[601] See note 290, *supra*, for citations to these cases. The American Law Institute's *Model Penal Code*, which the Court also cited with apparent approval (354 U.S. at 487, n.20), although a bit ambiguous, favors a national community standard. It defines as obscene, material that considered as a whole predominantly appeals to prurient interest "if it goes substantially beyond customary limits of candor in description or representation of such matters" as nudity, sex, or excretion. MODEL PENAL CODE, *op. cit. supra* note 314, at § 207.10(2). It also provides for the admission of evidence of "the degree of public acceptance of the material in this country." *Id.* at § 207.10(2)(d). In the comments, the ALI draftsmen note that "evidence of 'public acceptance' in this country . . . is relevant under our definition of obscenity to show that the material went beyond 'customary limits of candor.' " Then they say:

> For example, a book could hardly be held obscene in one county of a state if it appeared openly on public library shelves and in book stores throughout the state. And a tribunal in one state is entitled to know that a moving picture or book has circulated elsewhere in the United States, that it has been reviewed in responsible journals there, and, perhaps, that it has been adjudicated to be or not to be obscene. Customs do indeed vary among our states, but it would be unfortunate to have no evidence on "public acceptance," in a case where material is challenged so promptly in a particular jurisdiction that the only opportunity to test public acceptance has been in other states. Also the divergence of custom between one state and another is probably far less than differences between various social and religious groups within any one state. Furthermore, since a large part of the responsibility in this area has been assumed by the national government enforcing federal obscenity legislation, a country-wide approach is almost unavoidable. That which does not offend the sensibilities of most Americans is likely to be in the area of controversial morals or aesthetics, inappropriate for penal control.

MODEL PENAL CODE, *op. cit. supra* note 314, Comments at pp. 44–45.

[602] 355 U.S. 35, *reversing* 244 F.2d 432 (7th Cir. 1957).

[603] See notes 163 & 168, *supra.*

[604] The Court's decision in the *Kingsley Pictures* case also supports this position. The majority rejected the state's limitation on advocacy of "immoral" conduct, while three Justices concurring, rejected what they viewed as a state court finding of obscenity. For an analysis of the case, see text accompanying notes 194–221 *supra.*

But if the contemporary standards of particular state and local communities are not constitutionally applicable, whose standards are? If we turn to the national community—the American public in general—we find this standard illusory. Of the national community's contemporary standards we know only that contemporary American society rejects and will not tolerate the dissemination of hard-core pornography.[605]

Beyond hard-core pornography we find ourselves without a reliable guide when we look to "community standards:" For as Judge Jerome Frank pointed out more than ten years ago, "we do not know, with anything that approximates reliability, the 'average' American public opinion on the subject of obscenity."[606] And even if we did know enough about contemporary community standards to find a consensus on material short of hard-core pornography that the community will not tolerate, we would still find ourselves in difficulty. Standards of acceptability, even when national and reasonably definite, are of dubious value in obscenity cases. In applying them, we are in the words of Zecharia Chafee saying, "'We will permit what we will permit,' which is going around in a circle" and endangering daringly experimental "works of literary and artistic distinction."[607] Their application also puts us in the awkward position of having to explain the presence in many libraries and museums of distinguished works of the past that offend contemporary standards—an explanation that is so hard to make that most of the time we simply look the other way in embarrassment whenever anyone calls attention to them.[608]

In our judgment contemporary community standards have little place in obscenity censorship. If the contemporary standards are taken as those of particular state or local communities, their application would emasculate independent judicial review based on federal constitutional standards governing obscenity censorship,[609] Balkanize art and literature in the United States, and reduce art and literature to the levels of the most Philistine communities in the country[610] in a manner not unlike the Michigan statute held unconstitutional in *Butler v. Michigan*.[611] If, on the other hand, the contemporary standards are taken as those of the national community, their application to material that falls short of hard-core pornography[612] would make of obscenity an intolerably vague and indefinite concept, for there is no national consensus beyond the consensus on hard-core pornography.[613] And even this broader standard would, as in the trial of the *Roth* case itself, invite triers of fact to apply Philistine standards in judging material for obscenity.[614] Under either view there would be little room for the concept of variable obscenity, which permits particular primary audiences of sexually mature and sophisticated adults to have access to material that many members of the public might regard as shockingly obscene.[615]

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[605] For an analysis of hard-core pornography, see text accompanying notes 340–64 *supra.*

[606] Roth v. Goldman, 172 F.2d 788, 796 (2d Cir. 1949).

[607] CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 209–10 (1947). See also Lockhart & McClure, *supra* note 1, at 335–38.

[608] See Roth v. Goldman, 172 F.2d 788 (2d Cir. 1949), where the majority ignored Judge Frank's comparison of *Waggish Tales from the Czechs* with Balzac's *Droll Stories*, which, he said, could be found in "almost any public library." *Id.* at 796.

The same would be true, though perhaps not in quite as many libraries, of Ovid's *Art of Love* and Pietro Aretino's naughty works.

[609] See pp. 114–20 *infra*, for our consideration of independent judicial review of obscenity decisions.

Though in our judgment "contemporary community standards", whether local or national, have little place in obscenity cases, the Supreme Court used the phrase in its *Roth-Alberts* opinion,[616] and we have to make what sense of it we can. We have already demonstrated that the Court has not accepted and will not accept the restrictive standards of particular local communities in obscenity censorship.[617] And we think the same is true of contemporary community standards conceived of as the contemporary standards of the national community as a whole. It could scarcely be said that *One, The Homosexual Magazine* enjoys any substantial degree of public acceptance in the nation or that it comports with contemporary standards of the average or majority of the national community; yet the Supreme Court in a per curiam decision summarily reversed a United States court of appeals decision affirming a district court judgment that had sustained a postal determination that the magazine was obscene.[618] Consequently, we doubt that the Supreme Court regards the contemporary standards of the national community as those of the average or majority of the populace. The application of such standards would reduce art and literature to levels acceptable to the masses and deprive particular primary audiences of material that is of social importance to them.

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[610] See Lockhart & McClure, *supra* note 1, at 314–16, for the impact of Detroit's notorious censorship operation upon publishers of paperbound books, one of whom succumbed to submitting manuscripts for censorship before publication.

[611] 352 U.S. 380 (1947). See text accompanying notes 44–65 *supra*.

[612] See text following note 415 *supra*, and text accompanying note 439 *supra*, for our suggestion that the Supreme Court may limit material that may be constitutionally censored for obscenity to hard-core pornography. That issue, however, is still unresolved.

[613] See text accompanying notes 605–06 *supra*. Nor is there likely to be any consensus in state and metropolitan communities; in some small, self-contained communities there may be.

[614] See note 87 *supra* and accompanying text.

[615] See text accompanying notes 424–25 *supra*.

[616] See note 592 *supra*.

[617] See text accompanying notes 602–04 *supra*.

[618] See notes 165 & 168 *supra*.

All of this, however, suggests only what the phrase "contemporary community standards" does not mean; it tells us nothing of what it does mean. As before, we are brought to the conclusion that the Court was here using a positive form of statement to express its disapproval of the negative side of the coin.[619] In the context in which the Court employed the phrase, the Court was rejecting the Victorian standards embodied in the *Hicklin* test for obscenity which, as interpreted by some American courts, judged material by the effect of its parts upon particularly susceptible persons.[620] It seems likely that the Court used the phrase as a means of expressing its disapproval of the application of Victorian standards today. Thus interpreted, the phrase "contemporary community standards" would free art and literature in the United States from standards set by those who little understand them or appreciate their values. Such an interpretation would also eliminate from obscenity cases any consideration of such dangerously expansive concepts as "local community standards" and should lead to greater concentration upon more precise tools for determining obscenity.[621]

I. INDEPENDENT JUDICIAL REVIEW

In our opinion, an independent review of the questioned material to determine whether it is "obscene" within the constitutional requirements is now the obligation of every judge and appellate court before whom the constitutional issue is raised, subject to ultimate review in appropriate cases by the Supreme Court. Before *Roth-Alberts,* some appellate courts tended to look upon a finding of obscenity in the trial court as a factual finding, subject to reversal only if the decision could not reasonably be reached on the "evidence"—ordinarily only the book itself.[622] In *Roth-Alberts,* Mr. Justice Harlan in a concurring opinion expressed the fear that formulating constitutional requirements in terms of "obscenity" could make the issue of suppressing a book "a mere matter of classification, of 'fact,' to be entrusted to a factfinder and insulated from independent constitutional judgment."[623] Indeed, even after *Roth-Alberts,* the Postmaster General contended, without success, that his finding of obscenity was conclusive if supported by substantial evidence.[624] But now that censorship for obscenity is subject to constitutional limitations, every judge faced with a censorship issue has an obligation to make an independent determination of the constitutional issue, which he cannot properly avoid by classifying "obscenity" as only a factual question.

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[619] See text accompanying notes 403–04 *supra.*

[620] See text accompanying notes 299–300 *supra.*

[621] We have suggested some of these tools at pp. 57–67, 77–87 *supra.*

[622] See, *e.g.,* People v. Wepplo, 78 Cal. App. 2d 959, 178 P.2d 853 (1947); Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945); People v. Pesky, 254 N.Y. 373, 173 N.E. 227 (1930).

The Supreme Court has made it abundantly clear that where constitutional rights are at stake it will not be bound by the factual determinations of lower courts.[625] Ordinarily, if the facts are in dispute, the Supreme Court accepts the state courts' findings on the disputed facts,[626] though it retains freedom to review the evidence and reach different conclusions in appropriate cases.[627] But in applying constitutional standards to the factual findings below, or to the undisputed facts, the Supreme Court exercises an independent judgment on the constitutional issue, even though it is couched in terms of a factual finding.[628] The rationale of such cases was well stated by Mr. Justice Frankfurter in *Watts v. Indiana.*[629] After referring to the usual deference to state court determinations on issues of fact, he stated:

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[623] 354 U.S. at 497.

[624] Grove Press, Inc. v. Christenberry, 276 F.2d 433, 435–36 (2d Cir.), *affirming* 175 F. Supp. 488, 496 (S.D.N.Y. 1959), considered p. 117 *infra.*

[625] *E.g.*, Napue v. Illinois, 360 U.S. 264, 271 (1959); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 112 (1954); Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Craig v. Harney, 331 U.S. 367, 371–72 (1947); Pennekamp v. Florida, 328 U.S. 331, 335 (1946); Hooven & Allison Co. v. Evatt, 324 U.S. 652, 659 (1945); United Gas Co. v. Texas, 313 U.S. 123, 143 (1938); Norris v. Alabama, 294 U.S. 587, 590 (1935). See generally 4 Davis, Administrative Law § 29:08 (1958); Berman, *Supreme Court Review of State Court Findings of Fact in Certain Criminal Cases: The Fact-Law Dichotomy in a Narrow Area,* 23 So. Calif. L. Rev. 334 (1950); Mishkin, *The Federal Question in District Courts,* 53 Colum. L. Rev. 157, 173 (1953); *Supreme Court Review of State Court Findings of Fact,* 55 Harv. L. Rev. 644, 647–50 (1942).

[626] *E.g.*, Gallegos v. Nebraska, 342 U.S. 55, 61 (1951); Pennekamp v. Florida, 328 U.S. 331, 335 (1946); Hooven & Allison Co. v. Evatt, 324 U.S. 652, 659 (1945); Lyons v. Oklahoma, 322 U.S. 596, 602 (1944).

[627] *E.g.*, Napue v. Illinois, 360 U.S. 264, 271 (1959); Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Craig v. Harney, 331 U.S. 367, 371–72 (1947); Pennekamp v. Florida, *supra* note 626, at 335; Hooven & Allison Co. v. Evatt, *supra* note 626, at 659. The Supreme Court has frequently said it will review the findings of fact by a state court (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass on the federal question to analyze the facts. *E.g.*, United Gas Co. v. Texas, 303 U.S. 123, 143 (1938); Norris v. Alabama, 294 U.S. 587, 590 (1935).

[628] Napue v. Illinois, 360 U.S. 264, 271 (1959) (did prosecutor's knowing use of false testimony have effect on jury so as to deny due process?); Gallegos v. Nebraska, 342 U.S. 55, 61 (1951) (was confession "voluntary"?); Niemotko v. Maryland, 340 U.S. 268, 271 (1951) (did talk on Bible in park constitute "disorderly conduct"?); Watts v. Indiana, 338 U.S.

> But "issue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. . . . Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this court sits.[630]

This obligation—to reach an independent judgment in applying constitutional standards and criteria to constitutional issues that may be cast by lower courts "in the form of determinations of fact"—appears fully applicable to findings of obscenity by juries, trial courts, and administrative agencies. The Supreme Court is subject to that obligation, as is every court before which the constitutional issue is raised.

Obscenity cases seldom involve factual disputes relating to the obscenity issue. Occasionally a factual issue may be raised by the testimony of literary experts, or by evidence relating to the audience and method of marketing or to scienter and the knowledge of the seller.[631] In such cases the Supreme Court and other appellate courts should show proper deference to factual findings, though where a finding affects a claim of constitutional right the Supreme Court retains the power to determine whether the evidence supports the findings. But most cases involve no factual dispute relating to obscenity; the only issues are whether the questioned material—the book, magazine, or film—satisfies the statutory requirements and can be forbidden under the constitutional standards established by the Supreme Court. The application of the constitutional standards to the material itself, in the light of any factual findings supported by evidence, is a question of law upon which each court faced with the constitutional issue must exercise an independent judgment.

49, 51 (1949) (was confession "voluntary"?); Craig v. Harney, 331 U.S. 367, 371–72 (1947) (did newspaper comment on pending case create clear and present danger to administration of justice?); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (same); Lyons v. Oklahoma, 322 U.S. 596, 602 (1944) (was confession "voluntary"?); Lisenba v. California, 314 U.S. 219, 238 (1941) (same).

[629] 338 U.S. 49 (1949).

[630] *Id.* at 51.

[631] If the Court moves to the concept of variable obscenity, more factual issues will arise than under the constant obscenity concept. See discussion of this problem in text accompanying notes 442–50 *supra.*

Since *Roth,* some reviewing courts have exercised an independent judgment on the constitutional standard,[632] but others have gone astray.[633] The issue was squarely raised when the Postmaster General insisted that his finding that the unexpurgated edition of *Lady Chatterley's Lover* was obscene had to be sustained if supported by substantial evidence. Both Judge Bryan in the federal district court[634] and Judge Clark for the court of appeals[635] rejected this position and, after independent review, found the novel not obscene under the *Roth* constitutional standards. Judge Clark reasoned that, because the Post Office Department "considered only the novel itself . . . and declined to consider the expert evidence proffered by the plaintiff," the question was "one starkly of law":[636]

> Moreover, the plaintiffs raised the constitutional issue of freedom of expression . . . . Even factual matters must be reviewed on appeal against a claim of denial of a constitutional right. . . . Both legally and practically the claim of final censorship powers here made for the Postmaster General is extreme. Indeed it has received an incisive answer in the public press thus: "And courts, not post offices, are the proper places for a determination of what is and what is not protected by the Constitution."[637]

There is no reason to believe that the Supreme Court will take a different view.[638] When faced with similar problems in freedom of expression cases not relating to obscenity, it has taken a strong position concerning its obligation to exercise an independent judgment in the application of constitutional standards,[639] even to the point of a re-examination of the evidentiary basis for state court findings.[640] And when faced with lower courts' findings of obscenity, the Supreme Court summarily reversed the findings in three of the four per curiam decisions following *Roth-Alberts.*[641] In *Kingsley Pictures,* Justices Harlan, Frankfurter and Whittaker not only made an independent appraisal of the film to find it not obscene under the constitutional standards,[642] but emphasized the "necessity for individualized adjudication" so long as the Court stops "short of holding that all state 'censorship' laws are constitutionally impermissible."[643] While the majority in *Kingsley Pictures* made no independent judgment on the film because they found the statute itself unconstitutional, nothing in their opinion suggests any doubt about the propriety of an independent judicial review when obscenity under the constitutional standards is an issue.

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[632] *E.g.,* United States v. Keller, 259 F.2d 54 (3d Cir. 1958); Capitol Enterprises, Inc. v. City of Chicago, 260 F.2d 670 (7th Cir. 1958); Commonwealth v. Moniz, 338 Mass. 442, 155 N.E.2d 762 (1959).

[633] Alexander v. United States, 271 F.2d 140 (8th Cir. 1959); Big Table, Inc. v. Schroeder, 186 F. Supp. 254 (N.D. Ill. 1960); *In re* Search Warrant of Property at 5 W. 12th St. v. Marcus, 334 S.W.2d 119 (Mo. 1960). *Cf.* Volanski v. United States, 246 F.2d 842 (6th Cir. 1957) (before *Roth-Alberts*); State v. Clein, 93 So. 2d 876 (Fla. 1957) (same).

[634] Grove Press, Inc. v. Christenberry, 175 F. Supp. 488, 496 (S.D. N.Y. 1959).

[635] Grove Press, Inc. v. Christenberry, 276 F.2d 433, 435–36 (2d Cir. 1960).

[636] *Ibid.*

[637] *Id.* at 436.

[638] If we are right, the Postmaster General's efforts to secure legislation to insulate his obscenity decisions from effective judicial review will prove abortive, whatever the result in Congress. See pp. 37–38 *supra.*

[639] Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Craig v. Harney, 331 U.S. 367, 373–74 (1947); Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

[640] See cases cited note 639 *supra.*

While Justices Black and Douglas would hold all obscenity censorship unconstitutional,[644] and do not relish seeing the Supreme Court assume the role of "Supreme Board of Censors,"[645] Mr. Justice Douglas reluctantly recognized that "we must perform" that role under the prevailing constitutional standards.[646] Only Mr. Justice Black stands in adamant opposition to the role played by the Supreme Court in reviewing individual censorship rulings. He almost seems, in *Kingsley Pictures,* to take the position that the Court should not make such individualized judgments if "despite the Constitution, this Nation is to embark on the dangerous road of censorship."[647] But in view of Mr. Justice Black's consistent opposition to all interference with freedom of expression, it is safe to assume that he will vote to reject any form of censorship, even though he may decline to participate in appraising the material in the light of constitutional standards.

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[641] See discussion in notes 163, 165, 166 & 168 *supra* and accompanying text. Judge Bryan noted this significance of the per curiam decisions in his ruling on this issue. See Grove Press, Inc. v. Christenberry, 175 F. Supp. 488, 496 (S.D.N.Y. 1959).

[642] Kingsley Int'l Pictures, Inc. v. Regents of the Univ. of N.Y., 360 U.S. 684, 707–08 (1959).

[643] *Id.* at 708. In his separate opinion Mr. Justice Frankfurter also pointed out that the Court cannot "escape the task of deciding whether a particular picture is entitled to the protection of expression under the Fourteenth Amendment," just as the Court has had to proceed "case-by-case" in the other due process cases. *Id.* at 696–97.

[644] See dissenting opinion, Roth v. United States, 354 U.S. 476, 508 (1957); concurring opinions, Smith v. California, 361 U.S. 147, 155, 168, 169 (1959).

[645] See Mr. Justice Black's concurring opinions in Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 691 (1959), and Smith v. California, 361 U.S. 147, 159 (1959), and Mr. Justice Douglas' concurring opinion in Smith v. California, *supra* at 168. Compare Mr. Justice Jackson's expression of apprehension in the *Doubleday* argument that the Court might become the "High Court of Obscenity." 17 U.S.L. WEEK 3119 (1948).

[646] Concurring in Smith v. California, 361 U.S. 147, 169 (1959).

[647] He does not quite say so. What he says is that if the nation is to embark on censorship, despite the Constitution, "this Court is about the most inappropriate Supreme Board of Censors that could be found," is "unsuited to make the kind of value judgments . . . which the concurring opinions appear to require," and "this Court should not permit itself to get into the very center of such policy controversies, which have so little in common with lawsuits." 360 U.S. at 690–91.

The importance of independent judicial review of obscenity findings for the preservation of freedom of expression is self-evident. The constitutional standards would mean little if their only effective application were by administrators like the Postmaster General, vested with responsibility to censor, or by local administrators, judges, or juries, who are subject to the influence of local pressures and community sentiment stirred up by propaganda groups.[648] Neither professional government censors nor local juries are likely to be sensitive to the basic values of freedom of expression that gave rise to the constitutional standards—values that must enter into applying those standards. It may be true, as suggested by Mr. Justice Black, that judges "possess no special expertise" qualifying them "to supervise the private morals of the Nation" or to decide "what movies are good or bad for local communities."[649] But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court.

This does not mean that the Supreme Court need be overwhelmed with review of censorship cases. Once it has made its standards reasonably clear, it can depend upon state appellate courts and lower federal courts to apply those standards with fidelity and understanding, just as they apply constitutional standards in other equally important situations. Only an occasional review by the Supreme Court should be needed to clarify the standards and to keep the administration of obscenity laws in line with constitutional requirements.

Would acceptance of the variable obscenity concept[650] jeopardize effective judicial review of obscenity convictions? We think not. Under the variable obscenity concept, the determination of the audience to which the material is primarily directed and of the marketing methods aiming the material at that audience would be factual findings ordinarily accepted by the reviewing court. But a determination of the nature of the appeal to that audience would require application of the constitutional standards, subject to independent judicial review. In actual practice what would this mean? In a case tried to a judge without a jury, the judge would ordinarily make findings as to the primary audience, perhaps the methods of marketing, and finally the appeal of the material to that audience. The reviewing court would accept the findings as to the primary audience and the methods of marketing, if supported by evidence, but would independently review the findings with respect to the nature of the appeal of the material to its audience, for that finding would result from an application of the constitutional standards—whether couched in terms of appeal to prurient interest or appeal to erotic fantasy. Similarly, if a jury were to reach a verdict of guilty, the reviewing court would accept that version of the evidence relating to the audience and marketing methods most favorable to the verdict, but would independently review whether the nature of the appeal to the audience satisfied the constitutional standards.

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[648] See text accompanying notes 24–28 *supra.*

[649] Concurring in Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 690 (1959).

[650] See pp. 77–88 *supra.*

While the variable obscenity concept would thus introduce into obscenity adjudication two closely related factual determinations ordinarily beyond the reach of the reviewing court—the audience and the methods of marketing—it would not interfere with independent review of the critical constitutional question. The determination of whether particular material satisfies the constitutional standards for obscenity, as applied to a particular audience and a particular method of marketing, would still be subject to effective judicial review.

CONCLUSION

In the past three years the Supreme Court has made substantial progress toward developing constitutional standards for obscenity censorship, but difficult problems must still be faced. The Court has made it quite clear, both in words and in deeds, that constitutional freedom of expression applies to literature, art, and scientific works dealing with sex. It has established several significant constitutional limitations on obscenity censorship, all designed to prevent serious inroads on freedom in this area, though the full scope of these limitations has yet to be charted by the Court. But the Court has not yet struggled in its opinions with the core problem of obscenity censorship—how to draw the line between constitutionally protected material dealing with sex and material properly censorable as "obscene." It has thus far made no effort to clarify the brief, inadequate, and somewhat misleading *Roth-Alberts* verbal formulation relating to this core problem.[651]

It is important for the Supreme Court to give guidance to the lower courts on this core problem of obscenity censorship, but we do not criticize the Court for its delay thus far. On the contrary, we believe the Court has been wise to avoid an attempt in these first few years to verbalize the basis for its conclusions that obscenity findings in several cases violated constitutional requirements.[652] The Court is charting a new course here, and it is far more likely to chart a true course that will avoid dangerous shoals in the future if it gains substantial experience in dealing with these difficult cases before it makes any effort to generalize its constitutional standards for obscenity through a verbal formulation.[653] But soon it will have to formulate guide lines for the lower courts. When that time comes, we hope that our analysis will prove useful to counsel and to the Court.

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[651] Discussed at pp. 49–57, 72–73 *supra.*

[652] On several occasions the full Court or individual Justices have reached this conclusion in reversing obscenity findings, but have offered no explanation for their conclusion. See per curiam decisions, note 168 *supra* and accompanying text; separate concurring opinion of Mr. Justice Harlan in *Kingsley Pictures,* considered in text accompanying notes 216–21 *supra.*

[653] Compare Thurman Arnold's suggestion in a brief filed with the Supreme Court of Vermont that the Supreme Court's refusal to write opinions in the *per curiam* cases was "exceedingly wise," because "no one can reason why anything is or is not obscene . . . . The Court evidently concluded that its actions must speak for themselves in this field. This may be an unconventional way of making law, but in the field of pornography it is certainly sound judicial common sense." See Kalven, *supra* note 5, at 43–45, where a more complete statement of the Arnold argument may be found.